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# **INTERNATIONAL COOPERATION IN CRIMINAL MATTERS: A CASE STUDY OF THE EAST AFRICAN COMMUNITY**

THESIS SUBMITTED FOR THE DEGREE OF  
DOCTOR OF PHILOSOPHY

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UNIVERSITY OF SUSSEX  
THE SCHOOL OF LAW, POLITICS AND SOCIOLOGY

AUGUST 2020

## DECLARATION

I hereby declare that the present thesis has never been submitted before, in whole or in part, for any degree at any university.

SIBO GAHIZI YVES

Signature:

Date: 10<sup>th</sup> August 2020

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## ABBREVIATIONS

ACC:	Arab Cooperation Council
ACHPR:	African Charter on Human and Peoples' Rights
ACtHPR:	African Court of Human and Peoples' Rights
ADF:	Allied Democratic Forces
AEC:	African Economic Community
ALADI:	Latin American Integration Association
ALBA:	<i>Alternativa Bolivariana de las America</i>
AMISOM:	African Union Mission in Somalia
AMU:	Arab Maghreb Union
APEC:	Asia Pacific Economic Cooperation
ASEAN:	Association of East Asia Nations
AU:	African Union
CACM:	Central American Common Market
CACO:	Central Asian Cooperation Organisation
CAN:	<i>Comunidad Andina</i>
CARICOM:	Caribbean Community
CEI:	Central European Initiative
CEN – SAD:	<i>Communauté des Etats Sahélo-Sahariens</i>
CEPGL:	<i>Communauté Economique des Pays des Grands Lacs</i>
CEPOL	<i>Collège Européen de Police</i>
	European Union Agency for Law Enforcement
CET:	Common External Tariff
CFA:	<i>Communauté Financiere d'Afrique</i>
CFREU:	Charter of Fundamental Rights of the European Union
CIS:	Commonwealth of Independent States
CISA:	Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic

Union, the Federal Republic of Germany and the French Republic on  
the gradual abolition of checks at their common borders

CITES:	Convention on International Trade in Endangered Species of Wild Fauna and Flora
COMESA:	The Common Market for Eastern and Southern Africa
CSTO:	Collective Security Treaty Organisation
DNA:	Deoxyribonucleic Acid
DRC:	Democratic Republic of Congo
EAC Treaty:	Treaty for the Establishment of the East African Community
EAC:	East African Community
EACJ:	East African Court of Justice
EACSO:	East African Common Services
EAHC:	East African High Commission
EALA:	East African Legislative Assembly
EAMU:	East African Monetary Union
EAPCCO:	East African Police Chiefs Cooperation Organisation
EAW:	Extradition Arrest Warrant
EC:	European Community
ECCAS:	Economic Community of Central African States
ECHR:	European Convention on Human Rights
ECJ:	European Court of Justice
ECO:	Economic Cooperation Organisation
ECOWAS:	Economic Community of West Africa
ECRIS:	European Criminal Records Information System
ECSC:	European Coal and Steel Community
ECtHR:	European Court of Human Rights
EEC:	European Economic Community
EEW:	Evidence Arrest Warrant

EFTA:	European Free Trade Association
EIO:	European Investigation Order
EJN:	European Judicial Network
EPPO:	European Public Prosecutor's Office
EU 2000 MLA Convention:	Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union
EU:	European Union
EUROJUST:	European Judicial Cooperation Union
EUROPOL:	European Union Agency for Law Enforcement Cooperation
FATF:	Financial Action Task Force
FD EAW:	Framework Decision on the European Arrest Warrant
FD EEW:	Framework Decision on the European Evidence warrant
FDLR:	<i>Forces Démocratiques pour la Liberation du Rwanda</i>
GATS:	General Agreement in Trade on Services
GATT:	General Agreement on Tariffs and Trade
GCC:	Gulf Cooperation Council
IAD:	Intergovernmental Authority on Development
IADD:	Intergovernmental Authority on Drought and Development
IBEA:	Imperial British East Africa
ICCPR:	International Covenant on Civil and Political Rights
IORA:	Indian Ocean Rim Association
JHA:	Justice and Home affairs
JIT:	Joint Investigation Team
LAS:	League of Arab States
LRA:	Lord's Resistance Army
MERCOSUR:	<i>Mercado Comun del Súr</i>
MLA:	Mutual Legal Assistance
MR:	Mutual Recognition

NAFTA:	North American Free Trade Agreement
NATO:	North Atlantic Treaty Organisation
NGO:	Non – Governmental Organisation
OAS:	Organisation of American States
OAU:	Organisation of African Union
PCTF:	Police Chiefs Task Force
PIF:	Pacific Islands Forum
REC:	Regional Economic Community
SAARC:	South Asia Association for Regional Cooperation
SACU:	South African Customs Union
SADC:	Southern African Development Community
SADCC:	Southern African Development Coordination Conference
SCO:	Shanghai Cooperation Organisation
SPF:	South Pacific Forum
TEU:	Treaty on European Union
TFEU:	Treaty on the Functioning of the European Union
UDEAC:	<i>Union Douanière Economique de l'Afrique Centrale</i>
UEMOA:	<i>Union Economique et Monétaire Ouest-Africaine</i>
UN:	United Nations
UNODC:	United Nations Office on Drugs and Crime
USSR:	Union of Soviet Socialist Republics
WTO:	World Trade Organisation



## ABSTRACT

This thesis examines the development of cooperation in criminal matters in the EAC. It considers transnational organised crime as a phenomenon that calls for a comprehensive regional mechanism to coordinate national responses, especially since the freedom of movement provided by the EAC Common Market Protocol opens the door to criminals who take advantage of this right to frustrate justice and to find safe havens in the Partner States. The thesis draws on the experience of the EU to evaluate the relevance to the EAC of some of the legal and institutional mechanisms which have been developed in Europe.

Using a regionalism theoretical approach, the thesis views the re-establishment of the EAC in 1999 as a response to the pressure of economic globalisation, the worldwide emergence of the new regionalism after the end of the Cold War and consecutive resurgence of regional organisations in Africa, Asia, and South America. The example of the flourishing of European cooperation, and a clear global preference for multilateralism over bilateralism in issues such as trade and economy, security and environment were also significant issues.

Based on various reports on the types of crimes, the criminal networks involved and their routes, the thesis argues that transnational organised crime is a serious threat in the EAC that needs to be addressed urgently. The thesis also draws on interviews and other qualitative data collected at the EAC institutions and recommends a simplified and expeditious cooperation model freed from diplomatic and political interference and channelled directly between national authorities responsible for the subject matters of cooperation in the Partner States.

Furthermore, the thesis argues that the freedom of movement enshrined in the EAC Common Market Protocol should be extended to legal cooperation to allow mutual recognition of national courts' decisions and judgments for the surrender of suspected offenders and accused between the Partner States as well as the collection of evidence across national borders. More importantly, the thesis calls for the creation of a supranational East African criminal law applicable in transnational criminal proceedings, to ensure effective investigation of

transnational organised crimes and other serious offences as well as the prosecution and punishment of perpetrators in the region.

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# INTRODUCTION

## 1. Rationale for the research

The EAC is a regional organization that is comprised of six countries –Burundi, Kenya, Rwanda, South Sudan, Tanzania, and Uganda- with a combined population of about 177 million people and a land area of 2.5 million Square Kilometres.<sup>1</sup> The Community was established by a treaty signed on 30<sup>th</sup> November 1999, which entered into force on 7<sup>th</sup> July 2000 following its ratification by the three original Partner States Kenya, Uganda and Tanzania. The Republic of Rwanda and the Republic of Burundi acceded to the EAC Treaty on 18<sup>th</sup> June 2007 and became full members of the Community with effect from 1<sup>st</sup> July 2007, while the Republic of South Sudan acceded to the Treaty on 15<sup>th</sup> April 2016 and became a full member on 15<sup>th</sup> August 2016.<sup>2</sup>

The EAC aims at widening and deepening cooperation among the Partner States.<sup>3</sup> The regional integration process is currently at a high level, with a customs union in process and a common market<sup>4</sup> with free movement of persons, labour, goods, services and capital, and the right of establishment.

As regional integration progresses, criminal offenders who are citizens or residents of the EAC are now more free to move from one country to another, and to settle in the country of their choice within the Community. At the same time, the EAC Partner States are at different levels of economic and social development, including in their legal systems. These factors influence an offender's choice of moving to or settling in an EAC Partner State.

The EAC is likely to grow bigger as Sudan and Somalia formally applied to join it, and the DRC too expressed interest in joining the Community. Therefore, criminal matters in the EAC would be much more complex in the coming years.

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<sup>1</sup> <https://www.eac.int/overview-of-eac>, last accessed on 10<sup>th</sup> August 2020.

<sup>2</sup> *Ibid*

<sup>3</sup> Article 5 EAC Treaty

<sup>4</sup> <https://www.eac.int/overview-of-eac>, last accessed on 10<sup>th</sup> August 2020.

Like other many global justice systems confronted by the emergence and expansion of transnational crime,<sup>5</sup> those of the EAC are not spared. A report commissioned by the EAC in 2015<sup>6</sup> identifies the following as major and common transnational crimes in the EAC: drug trafficking, human trafficking and smuggling, terrorism, corruption, motor vehicle theft, wildlife related crimes (specifically poaching and illegal trade), cattle rustling, illicit trade in counterfeit goods and other illegal commodities, money laundering, racketeering, and trade and smuggling of small arms and light weapons.<sup>7</sup> The report also discusses the issue of terrorism financing in East Africa. It describes East Africa as a source, transit and destination of certain transnational organised crimes.<sup>8</sup> The report examines the factors that make the EAC region favourable to transnational organised crime, specifically criminal gangs, increased radicalization, corruption, the proliferation of small arms and light weapons, and terrorism amongst others, and the threat they pose to peace and security in the region.<sup>9</sup> Furthermore, the report examines mechanisms addressing transnational organised crimes in East Africa, firstly, national laws, policies, strategies and institutions, secondly, regional mechanisms including initiatives in other regional organisations to which the EAC Partner States belong. It discusses the effectiveness of the national mechanisms, their weaknesses and existing gaps between the Partner states' responses to transnational crimes. Lastly, the report identifies the challenges and opportunities of fighting transnational organised crimes under the framework of the EAC.

The EAC's response to transnational crime currently consists of loose policy frameworks that essentially encourage inter-states cooperation, as opposed to a common approach through regional cooperation. Partner States cooperate on the basis of bilateral treaties, for instance in matters of extradition. Some of the extradition treaties are relatively old and they need to be updated in order to cope with the expansion of crimes in the region. For example, the extradition treaty between Rwanda and Tanzania was ratified in 1965. A treaty between Rwanda and Burundi too was ratified in 1976. The only existing mechanism against transnational organized

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<sup>5</sup> UNODC (2006). *International Cooperation. Cross – Cutting issues*, p.1.

<sup>6</sup> East African Community (2015). *Study to assess transnational organised crime and terrorism in the EAC region*, 59p.

<sup>7</sup> *Ibid.*, p.5-34.

<sup>8</sup> *Ibid.*, p.vii.

<sup>9</sup> *Ibid.*, p.48-52.

crime in the region, the EAPCCO, which came into force in August 2002<sup>10</sup>, is not affiliated with the EAC.

This thesis is set against the current situation in the EAC, to examine the response of the EU to transnational crime, as a criminal justice system that successfully established effective mechanisms for cooperation in criminal matters, and their relevance for the EAC.

## 2. Objectives of the research

International cooperation in criminal matters has been recognised by the international community as an urgent necessity.<sup>11</sup> The EU has developed a unique form of international cooperation in response to organized crime,<sup>12</sup> which this thesis examines in search for a model suitable for handling transnational crime in the EAC. In this regard, the present thesis aims at:

- Analysing transnational organized crimes in the EAC and their effects in the region.
- Proposing legal and institutional mechanisms for cooperation in criminal matters adapted to the EAC, drawing upon the experience of the EU.
- Influencing the EAC legislator to adopt mechanisms for cooperation in criminal matters.
- Demonstrating the reasons law enforcement agencies and the criminal justice system actors in the EAC need to cooperate.
- Analysing the national legal systems in the EAC and understanding their specificities.
- Demonstrating the inefficiency of current bilateral mechanisms of cooperation among the EAC Partner States.
- Understanding the decision-making system of the EAC.
- Analysing the impact of globalization and transnationalization of the law on the EAC.

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<sup>10</sup> UNODC (2008). *Toolkit to Combat Trafficking in Persons*, New York, p.169.

<sup>11</sup> UNODC (2006). *Op.Cit.* p.1.

<sup>12</sup> Joutsen, M. (2006). *The European Union and cooperation in Criminal Matters: the Search for Balance*. The European Institute for Crime Prevention and Control, p.7, 8. Accessed at [www.heuni.fi/material/attachments/heuni/papers/.../HEUNI\\_papers\\_](http://www.heuni.fi/material/attachments/heuni/papers/.../HEUNI_papers_) on 10 July 2014.



### 3. The significance of the study

As an economic and trade regional cooperation organization, the EAC attracts economic and trade research mostly. All legal researches on the EAC that I have come across are related to human rights. This research is the first of its kind. The topic is unknown or perhaps ignored, mostly because of the failure to understand transnational crime and the implications of the policies of the EAC on the expansion of transnational crimes in the region. The research is the first thesis to generate knowledge about transnational crime in the EAC and to propose a cooperation model applicable to the EAC. This was specifically commended by the respondents to the interviews conducted for the research at the EAC, as illustrated in the following three quotes: “This is very important area of research that may be has very few scholars or researchers”;<sup>13</sup> “This study of cooperation in criminal matters is very important study for us as a region today, is reality we are living in, ... we encourage our own citizens to do deep interrogation and help those of us in the service of the Community to gain knowledge...”;<sup>14</sup> “This is a very unique opportunity ... to have someone looking at another area which no one talks about but which actually would play a major role to securing this region...”.<sup>15</sup> The thesis contributes to the literature on transnational crime, a field in which so little or nothing has been written in the EAC and certainly no major legal research published. The thesis gives a more comprehensive narrative of transnational crime in the EAC, the criminal networks involved, their methods, means and routes, unlike various reports that either focus on specific transnational crimes or examine the wider eastern Africa region. Also, the 2015 report on transnational crimes commissioned by the EAC did not include South Sudan as the latter had not yet been admitted as a Partner State.

The thesis is the first research to examine cooperation in criminal matters in the EAC and the implications, for the Community, of the cooperation system of the EU. It establishes, from interviews conducted with officials at the Secretariat, the Parliament and the Court of Justice of the EAC, that the Community needs to develop a regional mechanism in response to

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<sup>13</sup> Interview with Respondent 1.

<sup>14</sup> Interview with Respondent 5.

<sup>15</sup> Interview with Respondent 7.

transnational crime. Whereas reports on transnational crime in the EAC examine cooperation from an interstate perspective, this thesis is the first research to propose a regional cooperation mechanism in criminal matters and the adoption of mechanisms that operate above the states' level. In that sense, it is the first research to break into a field in which nothing has been examined so far in the EAC. The research will influence the leadership and the decision-making organs of the EAC to expand cooperation to criminal matters as a matter of urgency, based on the provisions of the Treaty. To quote a respondent to the interviews, who encouraged me to share the research with the leadership of the EAC, in particular the Secretariat, and to make sure it informs policy, "research ... must be able to get towards influencing certain positions and decisions".<sup>16</sup> This research engages the policymaking and the judiciary of the Community on cooperation in criminal matters and it informs them on models and mechanisms developed in other regional contexts, specifically the EU, and the extent to which they could be adapted to the EAC. It also informs the EAC and the wider public about the dynamics of a regional governance and its effects on the expansion of transnational crime in the region but also the duty and the capability of the Community to address these and other similar issues affecting its interests and those of the Partner States.

The thesis studies the EAC as one of the six RECs composing the AU<sup>17</sup> and a *sui generis* organization, being the only one in the world with the aim for a political federation. As such, the thesis contributes to the awareness of the EAC, locally and globally, and the problems of transnational crime in the region. The thesis will inspire other African RECs that may experience the same challenges as the EAC and wish to fight their own crime problems, transnational or otherwise. All EAC Partner States are members of other RECs in Africa. The proposals and recommendations contained in this research will have a great impact beyond the EAC.

The expansion of transnational crime in the EAC in worrying proportions, since the re-establishment of the Community in 1999, was unexpected. It was not anticipated that the

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<sup>16</sup> Interview with Respondent 1.

<sup>17</sup> Article 130(2) EAC Treaty provides that 'the Partner States regard the Community as a step towards the achievement of the objectives of the Treaty Establishing the African Economic Community'.

EAC would become a hub for transnational crime, comparable to the Balkans in Europe, or a strategic location for transnational criminal networks. What distinguishes this thesis from reports and studies on transnational crime in the EAC is its theoretical explanation, particularly regionalism as a policy response to global and regional challenges such as transnational crime.<sup>18</sup>

#### **4. Research questions**

Research questions indicate gaps in the scope or the certainty of the knowledge.<sup>19</sup> In order to achieve the proposed objectives defined in this thesis, the following questions will be addressed:

- Why should the EAC develop cooperation in criminal matters?
- How can the EAC achieve effective cooperation in criminal matters?
- Which model of cooperation is suitable for the EAC?
- What principles should determine an appropriate model of cooperation in criminal matters in the EAC?
- What are the effects of transnational crimes on the EAC Partner States and on the Community?
- What are the challenges and opportunities for cooperation in criminal matters in the EAC?

#### **5. Theoretical framework**

The thesis applies the theory of regionalism to understand the reasons that motivate states, including those of the EAC, to cooperate. The EAC being a regional integration organization, it seemed logical, in the thesis, to find out what regionalism is, as a mode of governance that guides states belonging to a specific geographical area or grouped around a specific issue in their endeavor to form a new polity. Applying regionalism as a theoretical framework helps understand its various descriptions in order to identify its manifestations in the EAC. More importantly, the thesis applied regionalism to establish to what extent criminal matters may

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<sup>18</sup> Heine, J. (2012). "Regional integration and political cooperation in Latin America". *Latin America Research Review* 47(3), p.217.

<sup>19</sup> Brewer, J. and A. Hunter (2006). *Foundations of Multimethod Research*. Thousand Oaks, Sage, p.39.

constitute a possible area for cooperation in the EAC which is primarily an economic integration organization. Economic pursuit and security imperatives have characterized regionalism worldwide since its early manifestations.<sup>20</sup> Even when states cooperated in criminal matters, as within the Council of Europe, it has always been essentially an inter-states cooperation, compared to more advanced and binding forms of cooperation, such as supranationalism, in trade. It is not until the rise of constructivism in the 1980s and the resurgence of issues of identity and belonging in many parts of the world, after the end of the Cold War, that regionalism expanded its range of activities and missions to other issues. These included global and regional challenges, such as transnational crimes, climate change, natural disasters, environmental protection, pandemics, social and cultural development, poverty, inequality, etc.<sup>21</sup> In this thesis, transnational crime is the starting point for arguing for the extension of cooperation in the EAC to criminal matters. The thesis considers transnational crime as a regional challenge in the EAC that calls for a regional response in accordance with regionalism's spillover effect which, the thesis argues, requires extending cooperation to transnational crimes. Such expansion is attributed to the economic policies of the Community, specifically the Common Market's free movement of persons, goods, and factors of production. This line of argument is made possible only by taking into account constructivism's view of regionalism as a policy that incorporates formal organizational processes at states' level as well as informal processes across national borders, such as transnational crimes.<sup>22</sup> This new regionalism recognizes both top – down and bottom – up processes, meaning the policies of states as well as the activities of grassroots participants such as informal traders, smugglers or the civil society,<sup>23</sup> in contrast to the old regionalism which was essentially states – led and excluded non – state actors.

In order to understand the functions of the EAC as an institution, the thesis applies institutionalism too as a complementary theory, largely because it is the most well-developed

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<sup>20</sup> See Acharya, A. (2012). "Comparative Regionalism: A Field Whose Time has Come". *The International Spectator*. 47(1), p.11.

<sup>21</sup> *Ibid.* Also, Heine, J. (2012). *Op.Cit.*, p.217.

<sup>22</sup> See Kitipov, J. (2012). "African integration and inter – regionalism: The regional economic communities and their relationship with the European Union". *Strategic Review for Southern Africa* 34(1), p.24.

<sup>23</sup> See Staeger, U. (2015). *The European Union's Regionalism Diplomacy in Africa: An English School Approach*. *UNU-CRIS*. Bruges Regional Integration and Global Governance Paper 2/2015, p.5.

literature in the study of international institutions. The thesis focuses on the influence of constructivism, as a theory that has dominated the study of international organisations since the end of the Cold War.<sup>24</sup> The reason for this choice is the capacity of constructivist – institutionalism to explain institutional change, in contrast to all other institutionalism variants (rational, sociological and historical) that basically conceive institutions as static.<sup>25</sup> This is important considering the thesis' proposal that the EAC should extend cooperation from trade and economy to criminal matters and adopt the various implementation mechanisms which are proposed. Constructivist institutionalism manages to explain institutional change, unlike older institutionalisms, by shifting the centre of its attention from institution to individuals or actors.<sup>26</sup>

It is widely accepted among institutionalists that institutions matter because they structure strategic incentives and constraints. All other institutionalism variants tend to see agents or individuals as deeply embedded or constrained by their institutional environments and they attribute institutional change to exogenous shocks or crisis,<sup>27</sup> while constructivist – institutionalists argue instead that actors create, recreate or maintain institutions in a dialectic process of interaction.<sup>28</sup> The proponents of constructivist – institutionalism also argue that it is important to understand individuals or actors' perception of their institutional norms and rules. Hence, interviews were conducted as part of this thesis, to capture the views of the EAC's officials on the thesis' proposed changes to the Community. The views expressed in the interviews informed the proposals put forward in the thesis and they were incorporated to make sure that they exert a causal influence in the adoption, by the Community, of the very proposals. It was fundamental in the thesis to consider the ideas of those at the heart of policy formulation and communication in the EAC, not only for shaping the various mechanisms proposed in support of

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<sup>24</sup> Hurrell, A. (1995). "Explaining the resurgence of regionalism in world politics". *Review of International Studies* 21, p.349-350.,

<sup>25</sup> Bell, S. (2011). "Do we really need a New 'Constructivist Institutionalism' to Explain Institutional Change?". *British Journal of Political Science* 41(4), p.885.

<sup>26</sup> See Snaith, H. (2013). Constructivist institutionalism, (multi – level) governance, and the Euro crisis. Paper presented to BISA annual conference (Draft), Birmingham, p.2,10 and 15.

<sup>27</sup> Sterling – Folker, J. (2000). "Competing Paradigms or Birds of a Feather? Constructivism and Neoliberal Institutionalism Compared". *International Studies Quarterly* 44, p.103, 104.

<sup>28</sup> See Schmidt, A. V. (2008). "Bringing ideas and discourse back into the explanation of change in varieties of capitalism and welfare states". Centre for Global Political Economy. University of Sussex, p.6.

cooperation in criminal matters in the Community, but also for facilitating legitimacy and gaining approval.

## 6. Methodology

The thesis is document based in order to generate knowledge about international cooperation in criminal matters. It focuses on the use and analysis of relevant documents.<sup>29</sup> Thus, library and Internet constitute the main source for the research. Data were collected through interviews<sup>30</sup>, to address the thesis's research questions.<sup>31</sup> The interviews were designed as a standard set of questions. They consisted of face to face meeting with each respondent although skype interview too was considered an option.<sup>32</sup> The thesis applied structured interview with a standard questionnaire for all respondents.<sup>33</sup> This type of interview generated insightful information on the challenges and opportunities for cooperation in criminal matters in the EAC. It also helped to address the views of the participants on the cooperation model that the thesis proposes. All interviews were recorded on a digital tape recorder and subsequently transcribed *verbatim*. They were analysed and interpreted for the purpose of drawing conclusions regarding the research questions. The thesis used qualitative content analysis of data from interview transcripts, to interpret the opinions expressed in the interviews<sup>34</sup> and to identify the main themes that emerged from the responses given by the respondents.<sup>35</sup>

The plan for the interviews included a total of ten respondents as follows:

- The President of the Appellate Division of the EACJ
- The Principal Judge of the First Instance of the EACJ
- The Speaker of the EALA
- 5 members of the EALA representing each EAC Partner State

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<sup>29</sup> Hammond, M. and J. Wellington (2012). *Research Methods: The Key Concepts*. Oxon, Taylor and Francis. p.55.

<sup>30</sup> Schensul, J.J. "Methodology, Methods, and Tools in Qualitative Research". In: Lapan, S.T., Quartaroli, M.T et. al. (Eds). (2012). *Qualitative Research: An Introduction to Methods and designs*. San Francisco, Wiley

<sup>31</sup> Bhattacharjee, A. (2012). " Social Sciences Research: Principles, Methods, and Practices". Florida. USA, p.22. Accessed at [www.scholarcommons.usf.edu/cgi/viewcontent.cgi?article=1002&context=](http://www.scholarcommons.usf.edu/cgi/viewcontent.cgi?article=1002&context=) on 17 July 2014.

<sup>32</sup> Hammond, M. and J. Wellington (2012). *Op.Cit.*, p.91.

<sup>33</sup> Brinkmann, S. (2013). *Qualitative Interviewing*. Oxford. Oxford University Press, p.19.

<sup>34</sup> Bhattacharjee, A., *op.cit.*, p.116.

<sup>35</sup> Hammond, M. and J. Wellington (2012). *Op.Cit.*, p. 34.

- The Secretary General of the EAC
- The Counsel and Legal Advisor of EAC

One of the objectives of the research being to influence the EAC's decision-making, the respondents to the interviews were selected on the basis of their high profile in the EAC, that makes them the most suitable for an elite interview.<sup>36</sup>

Elite interviewing is a key qualitative research method in the social sciences.<sup>37</sup> It is a data collection technique used to access the views and interpretations of subjects under investigations.<sup>38</sup> The concept originated from the study of politics and policy-making.<sup>39</sup> It is used in this thesis to understand the consequences of the EAC's regional economic integration policies, specifically a possible correlation between the freedoms of movement provided by the Common Market Protocol and the expansion of transnational crime in the region.

The term 'elite' refers to individuals generally considered to be well known, famous, distinctive or important.<sup>40</sup> However, it does not necessarily connote socio-economic class, but rather elevated decision-making authority within formal or informal organisations such as government agencies, NGOs or businesses.<sup>41</sup> As such, it refers to individuals in powerful positions, for example, those in senior elected political and executive government roles or those who hold positions of professional prestige such as high-level bankers.<sup>42</sup> The rationale for using elite interviewing in this thesis is its purpose as defined in section 2 above, particularly influencing the EAC's legislator to adopt mechanisms for cooperation in criminal matters. The nature of the

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<sup>36</sup> Moyser, G. (2006). *The Sage Dictionary of Social Research Methods. Elite Interviewing*. London, Sage Publications, p.4.

<sup>37</sup> Boucher, A. (2017). "Power in elite interviewing: Lessons from feminist studies for political science". *Women's studies International Forum* 62, p.99.

<sup>38</sup> McEvoy, J. (2006). "Elite Interviewing in a Divided Society: Lessons from Northern Ireland". *Politics* 26(3), p.184.

<sup>39</sup> Kofi Darbi, W.P. and C.M., Hall (2014). "Elite interviews: critical practice and tourism". *Current Issues in Tourism* 17(9), p.832.

<sup>40</sup> Moore, N. and P. Stokes (2012). "Elite interviewing and the role of sector context: an organisational case from the football industry". *QMRJ* 15(4), p.439.

<sup>41</sup> Morse, Y.L. (2019). "Elite interviews in the developing world: finding anchors in weak institutional environments". *Qualitative Research* 19(3), p.278.

<sup>42</sup> Boucher, A. (2017). *Op.Cit.*, p.100.

thesis and the questions it seeks to answer justified considering elite interviewing worthwhile exercise.

Elite interviewing presents enormous advantages for this thesis. It provided it with valuable and unique data and prospective that could not be obtained through other data collection methods. In addition to wielding power in different settings, the participants to the interviews were knowledgeable and they showed excellent communication skills, which enhanced the quality and quantity of data collected.

Elite interviewing helped understanding the context and setting the tone of the subject matter of this thesis, cooperation in criminal matters, in the EAC. While it gave an opportunity to the interviewees to be heard, it also enabled understanding their perceptions and beliefs in relation to transnational crimes in the EAC and the prospect of expanding cooperation to criminal matters.

Elite interviewing is not a precise skill. It presents considerable methodological, interpretational, operational, and ethical challenges that this thesis wishes to recognize. Generally, accessing prospective participants to the interviews is a challenging process.<sup>43</sup> Elites are, by definition, less accessible and more conscious of their own importance,<sup>44</sup> which exacerbates problems of access compared to non – elite interviews. Consequently, elite interview samples tend to be a lot smaller.<sup>45</sup> The initial interview plan for this thesis targeted thirty-five (35) prospective participants, a number which was already small. In the final plan, this number was cut down to only ten (10) potential participants, of which eight (8) were interviewed successfully. One of the reasons two prospective participants were not interviewed is time constraint, which constitutes an important challenge in elite interviewing given elites are often widely sought after.<sup>46</sup>

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<sup>43</sup> Nir, E. (2018). "Approaching the bench; accessing elites on the judiciary for qualitative interviews". *International Journal of Social Research Methodology*, p.77.

<sup>44</sup> Richards, D. (1996), "Elite Interviewing: Approaches and Pitfalls". *Politics* 16(3), p.200.

<sup>45</sup> *Ibid.*

<sup>46</sup> See Aderbach, J. and B.A. Rockman (2002). "Conducting and Coding Elite Interviews". *PS* 35(4), 673.



Unrepresentative sampling is not often an issue in elite interviewing.<sup>47</sup> Contributions from elite may help develop inferences about larger populations.<sup>48</sup> However, corroboration of facts and additional information are required to make elites' accounts valuable.<sup>49</sup> In order to remedy this limitation of elite interviewing, which arguably cannot be relied upon as the sole methodology,<sup>50</sup> the data collected were reinforced with other forms of empirical data, specifically various reports including the study on transnational organised crime and terrorism in the EAC commissioned by the Community in 2015 and referred to in section 1 above.

There are many issues of ethics and openness in elite interviewing, such as confidentiality and conflicts of interest<sup>51</sup> both with extended professional ramifications. In order to alleviate some of these concerns, efforts were made to disclose my identity beforehand in the introduction and prior to conducting the interviews. Although the participants to the interviews for this thesis are high profile officials whose conducts are typically subject to public scrutiny, they did not express any concern over privacy or confidentiality, or any fear for repercussions on their work, or any distrust of the research process. Instead, they expressed interest in the study, support, and willingness to participate in the interviews.

This thesis complied with the University of Sussex's ethical approval requirements in the planning of the interviews. As part of the process, a consent form was made that spelled out clearly the conditions under which the interviews were to be conducted and it guaranteed confidentiality about the participants' identity. The interviews were not sensitive in any way and they did not present any risk to the participants either personally or professionally. Therefore, no formal permission to attribute quotes was sought from the participants. The interview questions too were not contentious. They were reviewed and approved by my supervisors. An information sheet too was made, inviting the participants to take part in the interviews and stating, amongst others, the purpose of the research project and its benefits to the participants, the study's topic, the anticipated interview duration, further confidentiality guarantees, the university's approval

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<sup>47</sup> Richards, D. (1996), *Op.Cit.*, p.200.

<sup>48</sup> Moore, N. and P. Stokes (2012). *Op.Cit.*, p.441.

<sup>49</sup> *Ibid.*

<sup>50</sup> Lilleker, D.G. (2003). "Interviewing the Political Elite: Navigating a Potential Minefield". *Politics* 23(3), p.208.

<sup>51</sup> Woliver, L.R. (2002). "Ethical Dilemmas in Personal Interviewing". *PS* 35(4), p.677.

as well as the research funding. Both documents, as well a detailed account of the fieldwork and the interviews questions are included in the appendix to this thesis.

## **7. Data analysis**

The following themes emerged from the interviews:

- 1) The threat posed by transnational crime and the relevance of cooperation in criminal matters

The respondents recalled the terror attacks in the Partner States and the existence of terrorist groups such as *Al Shabaab* and others affiliated to *Al Qaeda* in the EAC. They pointed out that the EAC is vulnerable to transnational crime because of porous borders and increased cross-border movements. The respondents suggested that criminals have taken advantage of the free movement of persons, workers and labour in the EAC Common Market, to cross the national borders. They argued that transnational crime is causing damages to the economies of the Partner States. They suggested that the EAC, as a region, needs to minimize the occurrence of transnational crime and its undesired effects. They further suggested that minimizing transnational crime is critical and imperative for the EAC, considering the Community's political federation objective.

The respondents found that crime is very key issue especially as the EAC moves towards political federation. They related the current stage in the integration in the EAC, e.g. the Customs Union, with the occurrence of tax crimes, or the Monetary Union with the occurrence of financial crimes. They argued that cooperation in criminal matters is as much important as other areas and is required to deter crimes in the EAC. They also argued that an integrated cooperation in all aspects is very important. They observed that there is a general agreement on the need to cooperate in crime matters as on trade. Further, they advanced that regional cooperation in criminal matters in the EAC needs due and urgent consideration as well as a framework.

- 2) Challenges to cooperation

The respondents emphasized the lack of a specific law or legal framework on cooperation in criminal matters as a challenge. They identified sovereignty as the biggest challenge to

cooperation, especially in criminal matters as an area governed by national sovereignty. They pointed out the fear and unwillingness of the Partner States to cede some of their power to a regional centre or a supranational authority. They recognized the differences in the legal systems in the EAC as a challenge to cooperation, particularly the differences in the criminal justice systems, for example plea bargaining in common law jurisdictions like Uganda while such procedure is not applied in civil law jurisdictions like Burundi. They also mentioned, as an example, evidence taped phone text which is allowed in Uganda while it could be unlawful in other Partner States. Death penalty too, which is applicable in Uganda or Kenya, unlike in Rwanda, is advanced as a challenge to cooperation and a possible motive for turning down requests for extradition.

Other challenges identified include the lack of trust between national agencies (as crime involves a lot of other processes such as information and intelligence sharing), rampant corruption and the lack of infrastructure and channels for communication in crime matters.

### 3) Model of cooperation

The respondents supported the research' suggestion for substituting the current bilateral cooperation conducted through diplomatic channels with a cooperation conducted directly between competent national authorities in the Partner States. They described the proposed model as more practical and appropriate to the EAC especially in respect of the Community's goal for political federation and a unitary governance. The respondents advanced that bilateral agreements are vote of no confidence to the regional spirit and mean no confidence in the institutions of the EAC as a regional system. They also advanced that cooperation through diplomatic channels is too long, loose and does not have a proper reprimand mechanism. They pointed out that what is needed is a smooth cooperation and a model which adds value such as expediting the cooperation process. They suggested that the EAC could learn from other regions and how they dealt with the issue.

The respondents recommended introducing an obligation to cooperate even in the absence of an agreement or legal instrument and regardless of the differences in the legal systems, to avoid the EAC becoming a hub for fugitives and criminals. Reasons advanced include that crime has no

boundary and a criminal in a Partner State must be considered a criminal in the EAC. A caveat was advanced for political offences or possible political prosecution disguised under criminal offence. The respondents recommended that the requested State is allowed a margin of appreciation on the reasonability and appropriateness of a request and must, in return, provide explanation, in a spirit of cooperation, about the reason it turns down a request. A requirement for human rights guarantees too was recommended.

#### 4) Human rights issues

The respondents emphasized that human rights are a treaty matter and a fundamental principle of the EAC. They drew attention on the need to translate human rights into a regional framework. The respondents expressed the need for a human rights instrument in the EAC, especially as far as criminal matters are concerned. They emphasized the need to create human rights standards in the EAC and stressed that variations in national standards would not allow a fair trial of fugitives at the regional level. The respondents advanced that the EAC, as an international organization, must conform to and apply standards that are internationally recognized too, although the latter may have a regional character. It was suggested that compliance with human rights is so important and human rights so fundamental that they cannot be left to the Partner States irrespective of whether the Partner States are signatories of various international instruments or not.

The respondents dismissed the possibility of a refusal to cooperate on human rights ground, which they argued create practical problems. They suggested that there could be exceptions acceptable within the principle of adherence to human rights, for example in case of death penalty that a person may face if extradited, but outright refusal to cooperate should not be tolerated or it would be abetting crime when somebody has already violated human rights. They emphasized the protection of procedural rights in proceedings related to cooperation in criminal matters, particularly fair trial, due process, the presumption of innocence, and the right to not be tortured.

Other relevant themes that emerged from the interviews include:

- Guidelines on cooperation issues for national criminal justice agencies and conferences to bring together stakeholders to discuss best practices.
- Harmonisation of laws and minimization of differences in the national criminal justice systems.
- Dialogues between national criminal justice authorities, specifically police, prosecution, judiciaries. Intelligences and offices of Attorney Generals too were mentioned.
- A regional centre or a mechanism to coordinate the dialogues, facilitate transmission of information and settle possible disputes.
- Mutual trust, as a fundamental principle of the EAC, to apply to cooperation in criminal matters.

## 8. Structure

Chapter one discusses the contrast between the early 1960s and 1970s rational and spatial conceptualisation of regionalism that emphasized the physical and geographical region with recent conceptualisations that consider more subjective meanings such as culture, language, identity, or religion. The chapter argues that the early conceptualization of regionalism was based on a Westphalian understanding of the global order and failed to account for non-state actors and, as such, fell short of a full explanation of regionalism.<sup>52</sup> The chapter favours the social constructivist approach to regionalism for its understanding of the region as socially constructed, politically contested and open to change.<sup>53</sup> This is particularly important for understanding the making of the EAC and its recreation in 1999 after the first EAC established in 1967 collapsed. It is also important for understanding the expansion of the EAC to more countries than the three original Partner States who started it. Moreover, the social constructivist approach helps understanding the EAC not as a static organization but as an institution open to change and to new ideas such as cooperation in criminal matters. The chapter emphasizes the social

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<sup>52</sup> Fawcett, L. (2008). "Regionalism in World Politics: Past and Present". In: Kosler, A. and M. Zimmek (2008). *Elements of regional integration. A Multidimensional Approach*. Baden. Nomos, p.3.

<sup>53</sup> Hurrell, A. (1995). *Op.Cit.* p.334. Also, Fawn, R. (2009). " 'Regions' and Their Study: Where, what for and where to?". *Review of International Studies* 35, p.31.

constructivist's turn to agency and actors (rather than structure and institutions) as well as to ideas, to explain institutional change.

The chapter contests the attribution of the origins of regionalism to Europe, unlike most Eurocentric explanations of regionalism.<sup>54</sup> It refers to manifestations of regionalism in Latin America since early nineteenth century.<sup>55</sup> The chapter discusses the resurgence of regionalism in the 1980s, spurred by the end of the Cold War, globalization and trade liberalization policies.<sup>56</sup>

Chapter two traces the historical development of international cooperation in criminal matters from the old practices of extradition in the United Kingdom and in France, particularly, and the practice of letters of request. It examines the fundamental principles of international cooperation in criminal matters, their meaning and their relevance for cooperation today. The chapter also discusses the global framework for international cooperation in criminal matters under the auspices of the UN.

Chapter three describes the EAC in terms of geographic proximity of the Partner States and their common colonial past that fostered an East African identity with shared languages, religions, infrastructures such as railway, harbour, post and telecommunications, airways, and comparable governments and legal systems. The chapter argues that regionalism in the EAC is the result of both the policies of the Partner States and the actions of the colonial power, Britain, that built the common services in transport and telecommunications in its East Africa former colonies.<sup>57</sup> The chapter describes the first iteration of the EAC in 1967 as motivated by the Pan-Africanism ideology spearheaded by African leaders, including the former President of Tanzania, late Julius K. Nyerere.<sup>58</sup> It attributes the collapse of the first EAC to various reasons such as striking opposed political ideologies in the region and the reflection of the Cold War and the tensions between capitalism and socialism in East Africa, personal rivalries and acrimonious relationships between

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<sup>54</sup> Acharya, A. (2012). *Op.Cit.*, p.6.

<sup>55</sup> Gardini, G. L. (2012). *Latin America in the 21st century*. Zeb Books. London, p.53.

<sup>56</sup> Schmitter, P.C. (2007). *Regional cooperation and regional integration*. Essay. The European University Institute, p.6.

<sup>57</sup> Sebalu, P. (1972). "The East African Community". *Journal of African Law* 16(3), p.345.

<sup>58</sup> Nabudere D. W. (1978). "Tanzania and Regional Integration in East Africa. Old and New Patterns". *African Review* 8(1-2), p.124.

the leaders, after Idi Amin's coup in Uganda, and more dysfunctional reasons such as the unequal share of the economic benefits and costs of the organization and consequent rise of nationalism.<sup>59</sup> The chapter views the re-establishment of the EAC in 1999 as connected to the global resurgence of the new regionalism and the relaunch of many other regional organisations including the EU. It argues that the new regionalism is wider in scope and includes bottom-up processes, unlike the first EAC which was essentially a top-down organization that concentrated the power in the hands of the head of States.<sup>60</sup>

The chapter argues that the current EAC reproduces the EU's linear model of integration which sequence includes a preferential trade area, a free trade area, a customs union, a common market (and a monetary union), and a political federation,<sup>61</sup> the latter stage exceeding the EU's model and making the EAC a *sui generis* regional integration organization. The chapter discusses shadow regionalism, particularly informal cross-border trade, as the result of intensified integration in the EAC and the proliferation of cash-based economies like many parts in Africa, with negative impacts such as the spread of organized crime networks involved in illicit transactions.<sup>62</sup>

Chapter four examines the extent of transnational crime in the EAC. It argues that the EAC is not just vulnerable to transnational crime but has also become a hub for transnational criminal networks lured by its strategic location that makes it the perfect transit for illicit goods between Asia and Europe<sup>63</sup> but also a destination and a source for illicit trafficking to different parts of the world. The chapter examines other factors that contribute to the vulnerability of the EAC to transnational crime, including weak rule of law, corruption, inadequate legal responses, lack of awareness, law enforcement poor knowledge and capacity to deal with crimes, conflicts and political turmoil in the Community and neighbouring third countries, the presence of non-state

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<sup>59</sup> Green, R. H. (1978). "The East African Community: A Valediction forbidding Mourning". *The African Review* 8(1), p.19-29. Also, Mngomezulu, B.R. (2013). "Why did regional integration fail in East Africa in the 1970s? A historical explanation". *History and African Study seminar*, p.5-8.

<sup>60</sup> Nabudere D. W. (1978). *Op.Cit.*, p.149.

<sup>61</sup> Article 2 and Article 5(2) EAC Treaty.

<sup>62</sup> Vayrynen, R. (2003). "Regionalism: Old and New". *International Studies Review*. 5, p.42.

<sup>63</sup> Shaw, M. (2005). "Organised Crime in Africa". In: Reichel, P. (Ed.) *Handbook of Transnational Crime and Justice*. Sage Publications. London, p.385.

armed groups and the proliferation of small arms and weapons in the region. The chapter examines the nature of transnational criminal networks in the EAC. It argues that they are fluid and flexible, involving ethnic groups such as Chinese, Iranians and Pakistani, local communities, family networks, loose organisations, local gangs, prominent business people, influential political figures, law enforcements, and members of the judiciaries.<sup>64</sup> The chapter argues that the modus operandi of transnational criminal networks in the EAC includes sea, air and land transportation. The chapter examines human trafficking and migrant smuggling, drug trafficking, terrorism, money laundering, terrorism and environmental crimes. It argues that transnational crime has been on the rise in the EAC, based on large scale seizures of illicit goods and multiple arrests of transnational criminal networks in the Community. The chapter also argues that although transnational crime is widespread in the EAC, Kenya and Tanzania are more affected because of their coastal borders along the Indian ocean compared to fellow landlocked Partner States, but also Kenya being the financial centre in the region.

Chapter five argues that the policies of the EAC, specifically the freedom of movement provided in the Common Market Protocol, facilitate the expansion of transnational crime in the region and engage the Community's duty to protect the citizens against the abuse of the freedoms and rights it provides. It argues that the current framework of the EAC in criminal matters is insufficient, promotes bilateral arrangements and is prone to complications where such arrangements do not exist. The chapter examines two multilateral models of cooperation that were successively developed in the EU: MLA and MR. It argues that MLA is unsuitable to the context of the EAC because of the intergovernmental character of the model and its lack of obligation.<sup>65</sup> Further, the chapter argues that the operationalization of MLA through diplomatic channels exposes it to political interference and makes it slow, bureaucratic and cumbersome.<sup>66</sup> The chapter argues that MR presents more advantages including the simplification and expedition of cooperation by

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<sup>64</sup> UNODC (2009). *Organised Crime and Trafficking in Eastern Africa*, p.13, 40. Also, East African Community (2015). *Op.Cit.*, p.5.

<sup>65</sup> Schünemann, B. (2014). "Solution Models and Principles Governing the Transnational Evidence Gathering in the EU". In: Ruggeri, S. (Ed.). *Transnational Evidence and Multicultural Inquiries in Europe*. Springer. London, p.166.

<sup>66</sup> Vandebroek, E and F Verbruggen (2013). "The EU and the death penalty abolition: The limited prospects of judicial cooperation in criminal matters as an external policy tool". *New Journal of European Criminal Law* 4(4), p.488.



removing political and administrative hindrances, setting strict deadlines and reducing practical problems to cooperation among states. The chapter examines legal mechanisms established in the EU in respect of extradition and assistance in evidence. It argues that their broad *ratione materiae* scope expose them to misuse for petty offences. Further, the chapter argues that the cost of the mechanisms and their effect on individual rights require limiting their application to transnational crimes and other serious offences. The chapter also analyses the institutional development of cooperation in criminal matters in the EU under both MLA and MR. It recommends the establishment, in the EAC, of a regional police agency and a regional criminal justice agency modelled on Europol and Eurojust respectively, for supporting the investigations of transnational crime and coordinating cooperation actions between competent national authorities directly. The chapter proposes the adoption of the principle of MR and the establishment of a transnational criminal justice system above the states' level, with minimum rules and principles similar to the EU criminal justice system. It also proposes the harmonization of procedural and substantive laws to remedy the lack of a unified body of transnational law<sup>67</sup> and to eliminate legal differences between the national criminal justice systems. The chapter argues that the adoption of a human rights instrument and concrete standards is a prerequisite for developing cooperation in criminal matters in the EAC.

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<sup>67</sup> See Mann, M. Warren, I and S. Kennedy (2018) "The legal geographies of transnational cyber-prosecutions: extradition, human rights and forum shifting". *Global Crime* 19(2), p.108.

## 1. THEORETICAL FRAMEWORK

### Introduction

The theoretical framework informing this research takes into consideration two needs. Firstly, understanding the context in which states cooperate, and subsequently the reasons that justify why states do so. Secondly, analysing the institution that constitutes a case study for this research, namely the EAC. Therefore, this chapter considers regionalism and constructivist institutionalism in an attempt to grasp the phenomenon of regional cooperation, both formal and organisational processes at the states level as well as informal processes across the borders of the states, such as organised crime networks. The understanding of the two theories will then sustain the arguments in subsequent chapters.

Whereas the two theories mentioned above are mostly associated with international relations and political studies, we have chosen them for two reasons. Firstly, most recent studies of regional organisations such as the EU or studies of aspects of regional integration largely apply the same theories. Although many authors assert that the theoretical debate is dominated by rational and constructivist theories, there is enough evidence that constructivism is increasingly taking over rational theories. Thus, this theoretical chapter favours the constructivist insight to both regionalism and institutionalism. Secondly, international legal scholars have increasingly been using international relations theories in their analysis of international law and institutions. The reason of such borrowing is indeed the proliferation of formal institutions for international cooperation in the global governance.

The structure of the chapter gives more space to conceptualising regionalism. The last section explains different theoretical approaches to the study of regionalism since its early conceptualisation and theorisation to date. The chapter is closed by a brief conclusion.

### 1.1. Understanding regionalism

It is challenging to give a precise definition of regionalism. Although the term 'regionalism' seems to have a straight-forward and obvious meaning, early academics and contemporary literature on regionalism do not provide a precise definition. This is mainly due to the nature of regionalism and the flexibility associated with it. Eelco Nicolaas van Kleffens, in an early attempt to define

regionalism, described it as a regional arrangement that must have an object, the region, and subject, the parties which must be sovereign states.<sup>68</sup> Describing regionalism with reference to a geographic region is a characteristic of almost all pioneering studies of regionalism in the 1960s and 1970s. While the reference to a geographic region sheds a light on understanding regionalism, it actually led to a misunderstanding of the phenomenon, sometimes equating it to a region, sometimes used interchangeably with other related terms like regionalisation. This resulted in a multitude of definitions, little consensus and a disagreement among scholars on the scope of the term. They often defined regionalism as attempts at formal cooperation between geographically proximate and interdependent states.<sup>69</sup> In the various definitions of the term 'regionalism', the geographic emphasis to some extent characterises most contemporary literature of regionalism although most of it has extended its conceptualisation to include new elements. Rafal Riedel, for example, defines regionalism as a tendency in international relations characterised by the intensification of cooperation through the increased use of institutional and non – institutional, formal and informal interrelations among countries belonging to some geographical area.<sup>70</sup> Regionalism is also presented as a body of ideas promoting an identified geographical or social space as the regional project.<sup>71</sup> A similar spatial conception of regionalism is put forward by Anju Lis Kurian who attributes three dimensions to regionalism: a defined geographic area with a significant historical experience in common; a definable geographic area with a developed social, cultural, political and economic linkages; and particular groupings of geographically proximate countries with an organised management of crucial aspects of their collective affairs.<sup>72</sup>

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<sup>68</sup> Van Kleffens, E.N. (1949). "Regionalism and politics Pacts". *The American Journal of International law* 43(4), p.667-668.

<sup>69</sup> Fawcett, L. (2008). "Regionalism in World Politics: Past and Present". In: Kosler, A. and M. Zimmek (2008). *Elements of regional integration. A Multidimensional Approach*. Baden. Nomos, p.3.

<sup>70</sup> Riedel, R. (2004). *Regionalism in the context of a political system*. 1<sup>st</sup> Danube Rectors Conference. Summer School on Regional cooperation, p.50.

<sup>71</sup> Spindler, M. (2002). *New Regionalism and the Construction of Global Order*. Centre for the Study of Globalisation and Regionalisation. Working Paper No.93/02, p.7.

<sup>72</sup> Kurian, A.L. and C. Vinodan (2013). "Regionalism and Regional Cooperation in International Relations: A conceptual Analysis". *Online International Interdisciplinary Research Journal* III(VI), p.403-404.

The above understandings of regionalism are contested for two reasons. Firstly, they are nationalistic, inward looking and casting regionalism to the borders of nation states and thus reflecting a purely Westphalian conception of the international or world order.<sup>73</sup> Their view of regionalism is a state – led project aimed at reorganising a particular regional space along defined economic and political lines or particular geo – economic spaces. Most of the literature on regionalism acknowledges the need to expand the understanding of regionalism to include non – state actors like NGOs and to reflect the character of the changing international order in which states are no longer the sole and exclusive players.<sup>74</sup> That said, the state is still important and the most powerful actor playing the predominant role in most regional arrangements. A successful regionalism project today presupposes eventual linkages between state and non - state actors<sup>75</sup>, given the increasing role of the latter in the international order. Non – state actors include not only NGOs, but also multinational corporations, the civil society, social movements, media, etc.

Secondly, the geographical understanding of regionalism is too narrow a view in an increasing interdependent and globalised world. It ignores other dynamics of regionalism.<sup>76</sup> Most geographically based definitions of regionalism are problematic in the sense that they imply a certain proximity of states in a regional organisation, yet a region is not determined by geography alone and geography is not an objective criterion.<sup>77</sup> Although geographical proximity is the cross – cutting descriptive term used by many of the studies, it does not fit well with a conception of regionalism that ties together states geographically distant from one another. For example, the Arab Cooperation Council formed in 1989 (but later on collapsed after the Gulf War) and which significantly, consciously and explicitly avoided any geographical limitation of membership.<sup>78</sup> Two other examples include Asia – Pacific Economic Cooperation and the Trans – Pacific Partnership

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<sup>73</sup> Fawcett, L. (2008). *Op.Cit.*, p.3.

<sup>74</sup> *Ibid.*

<sup>75</sup> Fawcett, L. (2004). "Exploring regional domains: A comparative history of regionalism". *International Affairs* 80(3), p.433.

<sup>76</sup> Hurrell, A. (1995). "Explaining the resurgence of regionalism in world politics". *Review of International Studies* 21(04), p.333.

<sup>77</sup> Bøås, M. (2001). "Regions and regionalisation: A heretic's view". In *Regionalism and Regional Integration in Africa. A Debate of Current Aspects and Issues*. Discussion Paper 11. Nordiska Afrika institutet. Uppsala, p.28.

<sup>78</sup> Hettne, B. (1994). "The New Regionalism. Implications for development and peace". In: Hettne, B. & A. Inotai (1994). *The New Regionalism. Implications for Global Development and International Security*. The United Nations University. World Institute for Development Economics Research. Forssan Kirjapaino Oy, p.33.

which final agreement was reached on 5 October 2015 and signed on 4 February 2016, awaiting entry into force. Geographical proximity remains controversial defining criterion that does not tell whether it means a same geographically specified area or implies contiguity, or even some kind of propinquity among the states involved in a regional organisation.

Louise Fawcett argues that the geographical criteria may be irrelevant since an international organisation may bring together states that are not necessarily geographically proximate and still deal with issues of a regional level.<sup>79</sup> The Asia – Pacific, for example, is sometimes considered as a single region, or an amalgamation of two regions, or a combination of more than two regions.<sup>80</sup> Most researchers agree that geographic proximity is not the sole determinant of common interests; besides proximity, other concepts need to be considered because a region implies more than just close physical proximity among the constituent states.<sup>81</sup> Interestingly, Christoph Schreuer predicted the decline of the geographic factor as a guiding element for group identification.<sup>82</sup> It holds a great meaning though since, without some geographical limits, the term regionalism becomes diffuse and unmanageable.<sup>83</sup>

## 1.2. Conceptualising regionalism

This thesis considers a broader conceptualisation of regionalism that includes non – geographical accounts. It understands regionalism as a series of interlinked but distinct phenomena that take place within a certain geographical area defined as region. Region is not the focus, rather a dimension that the thesis needs explaining before articulating the processes that constitute regionalism.

### 1.2.1. Region

It is difficult to define a region because it can evolve from objective, but dormant, to subjective existence.<sup>84</sup> A basic understanding of the term region presents it as a geographical reality. A region could be identified with one state or it could be a cluster of states sharing a common

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<sup>79</sup> Fawcett, L. (2008). *Op. Cit.*, p.3.

<sup>80</sup> Mansfield, E. and H.V. Milner (1999). "The New Wave of Regionalism". *International Organisation* 53(3), p.591.

<sup>81</sup> Mansfield, E. D. and E. Solingen (2010). "Regionalism". *Annual Review of Political Science* 13, p.146.

<sup>82</sup> Schreuer, C. (1995). "Regionalism v. Universalism". *European Journal of International Law* 6(1), p.498.

<sup>83</sup> Hurrell, A. (1995). *Op. Cit.*, p.333.

<sup>84</sup> Hettne, B. (1994). *Op.Cit.*, p.2.

space.<sup>85</sup> Exactly what constitutes a region remains controversial and a subject of disagreement among researchers.<sup>86</sup> A region can be defined in many ways depending whether geography, economy, history or culture is the defining criterion. The geographical concept of a region is usually based on its physical characteristics. From an economic point of view, a region is a zone within which there is more intensive cooperation between the countries than their relations with the rest of the world.<sup>87</sup> The cultural definition of a region may emphasise the similarity of historical development in such factors as ethnicity, religion, lifestyle, language, and other characteristics of societies.<sup>88</sup> A refined conception of regions should incorporate commonality, interaction and hence the possibility of cooperation.<sup>89</sup> Regions could be seen as units of states or territories, whose members display common patterns of behaviour, e.g. the Organisation of Islamic Cooperation.<sup>90</sup> They could also be imagined as community of states or peoples held together by common experience and identity, custom and practice.<sup>91</sup>

Significant common historical experiences, social, cultural, political and economic linkages, common shared organisations to manage crucial aspects of collective affairs are all factors that can define a region. Most researchers agree that a region implies more than just a physical proximity: social and cultural homogeneity, shared political attitudes, shared perceptions of various phenomena, political institutions and economic interdependence across multiple dimensions –including economic transactions, communications, and political values.<sup>92</sup>

Region is a contested and ambiguous concept. Like states, regions vary in their compositions, capabilities and aspirations. They can be formal or informal, institutionalised or not, created and recreated, their existence depending on political leaders' will. Political actors' perception and interpretation of a region is critical: all regions are socially constructed, hence politically

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<sup>85</sup> Fawcett, L. (2004). *Op.Cit.*, p.432.

<sup>86</sup> Mansfield, E. D. and E. Solingen (2010). *Op.Cit.*, p.

<sup>87</sup> Björn Hettne & András Inotai (1994). *The New Regionalism. Implications for Global Development and International Security*. The United Nations University. World Institute for Development Economics Research (WIDER). Forssan Kirjapaino Oy, p.V.

<sup>88</sup> *Ibid.*

<sup>89</sup> Fawcett, L. (2004). *Op.Cit.*, p.432.

<sup>90</sup> Fawcett, L. (2005). "Regionalism from a historical Perspective". In: Farrell, M., B. Hettne et. al. (2005). *Global politics of regionalism: Theory and Practice*. London. Pluto Press, p.25.

<sup>91</sup> *Ibid.*

<sup>92</sup> Mansfield, E. D. and E. Solingen (2010). *Op.Cit.*, p.146.

contested and open to change.<sup>93</sup> Geography is just as much as social construct. Various studies define regions largely in terms of non-geographic criteria and place relatively little emphasis on physical location.<sup>94</sup> For example, the British Commonwealth and the Francophonie, though global and physically diffuse, have been considered as regions.<sup>95</sup> Social constructivists have argued that countries sharing a communal identity comprise a region, regardless of their location.<sup>96</sup> This research espouses a non-geographic ideational and social constructivist understanding of a region, emphasising shared identities among states within a region, cultural, linguistic, economic and political ties. This subjective conception of a region is helpful for understating the processes of regionalism.

### 1.2.2. Regionalisation

Regionalisation means a concentration of activity –of trade, peoples, ideas, even conflict –at a regional level.<sup>97</sup> It refers to the growth of societal integration within a region and to the often undirected processes of social and economic interaction.<sup>98</sup> It is conceived as a multidimensional and multilevel process that implies trans-relations of social, political, cultural, security, environmental and economic nature between human groups across countries.<sup>99</sup> Regionalisation involves structural and organisational mechanisms that promote different levels of engagement within a particular region.<sup>100</sup> It fills the region with substance such as economic interdependence, institutional ties and political ties, political trust and cultural belonging in the region.<sup>101</sup> The process of regionalisation increases homogeneity among groups, in various dimensions such as culture, identity, economic policies, development and political regime.<sup>102</sup>

Early literature on regionalism describes regionalisation as informal regionalism, which is now

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<sup>93</sup> Hurrell, A. (1995). *Op.Cit.*, p.334.

<sup>94</sup> Mansfield, E. and H.V. Milner (1999). *Op.Cit.*, p.591.

<sup>95</sup> Fawn, R. (2009). “‘Regions’ and Their Study: Where, what for and where to?”. *Review of International Studies* 35, p.17.

<sup>96</sup> Mansfield, E. and H.V. Milner (1999). *Op.Cit.*, p.591.

<sup>97</sup> Fawcett, L. (2005). *Op.Cit.*, p.25.

<sup>98</sup> Spindler, M. (2002). *Op.Cit.*, p.6. Also, Hurrell, A. (2007). “One world? Many worlds? The place of regions in the study of international society”. *International Affairs*. 83(1), p. 130.

<sup>99</sup> Hettne, B. (1994). *Op.Cit.*, p.7.

<sup>100</sup> Kitipov, J. (2012). “African integration and inter – regionalism: The regional economic communities and their relationship with the European Union”. *Strategic Review for Southern Africa* 34(1), p.24.

<sup>101</sup> Vayrynen, R. (2003). “Regionalism: Old and New”. *International Studies Review*. 5, p.39.

<sup>102</sup> Hettne, B. (1994). *Op.Cit.*, p.8.

also referred to as soft regionalism, in comparison with formal institutionalised regionalism referred to as hard regionalism. Regionalization is often conceptualized in terms of “complexes”, “flows”, or “mosaics” as it involves increasing flows of people, the development of multiple channels and complex social networks by which ideas, political attitudes and ways of thinking spread from one area to another.<sup>103</sup> Regionalisation is not based on the policy of states or groups of states although it is often reinforced or influenced by states policies. It is a bottom – up process driven by private actors, economic or social forces that develop growth across national borders or build high levels of transnational human interpenetration.<sup>104</sup> Although regionalisation proceeds autonomous and spontaneous, it is not totally detached from politics.<sup>105</sup> Regionalisation can only be understood in the context of globalisation as a regional expression of global processes of economic integration. The most driving forces for economic regionalisation come from markets, from private trade and investment flows, and from the policies and decisions of companies.<sup>106</sup> When regionalisation advances far enough and attains some intrinsic regional features, it produces regionness.

### 1.2.3. Regionness

The concept regionness was developed mainly by Björn Hettne to link the social – political and institutional aspects of regional building.<sup>107</sup> Björn portrayed regionness in terms of organised social, political and economic trans – border relations supported by a manifested sense of belonging, common goals and values, and institutions and regulations that enhance the region’s ability to interact autonomously in the international arena.<sup>108</sup> A region here is essentially seen as a social construct and politically contested space less defined by geographic and physical location, rather by shared identity. The boundaries of the region are not fixed; the latter can enlarge, contract, be fluid and changing in its composition. The region is an imagined and subjective community with a distinct identity and a capacity to act. Björn speaks of regionness in analogy

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<sup>103</sup> Hurrell, A. (1995). *Op.Cit.*, p.334.

<sup>104</sup> Mansfield, E. D. and E. Solingen (2010). *Op.Cit.*, p.147

<sup>105</sup> Spindler, M. (2002). *Op.Cit.*, p.6.

<sup>106</sup> Hurrell, A. (1995). *Op.Cit.*, p.334.

<sup>107</sup> Ruggirozzi, P. (2010). *Region, regionness and regionalism in latin america: Towards a new synthesis*. Latin American Trade Network. Working Paper 130, p.2.

<sup>108</sup> Ruggirozzi, P. (2012). “*Region, Regionness and Regionalism in Latin America: Towards a New Synthesis*”. *New Political Economy* 17(4), p.425.



with concepts such as stateness and nationness.<sup>109</sup>

Regionness involves the capacity of a region to articulate its identity and interests.<sup>110</sup> A higher degree of regionness implies a higher degree of economic interdependence, communication, social, cultural homogeneity, coherence and capacity to act, in particular to resolve conflicts.<sup>111</sup> The description of a region by its level of regionness as expressed by Björn implies an increase of regionness from a mere regional space to deeper institutionalised polity with a decision-making structure and stronger acting capability as a global actor.<sup>112</sup> Regionness can thus be seen a process that transforms a region from a passive object to an active subject.<sup>113</sup> The term defines the position of a particular region in terms of regional cohesion. It has been applied to explain social cohesion manifested in a common background and sense of community in Europe, where a more developed sense of regionness has been recognised and that transformed the region from a mere geographical area and passive object to an active subject capable of articulating its transnational interests.<sup>114</sup> Identity and actor capability are at the core of regionness. Regionness equates to internal cohesion and identity formation.<sup>115</sup> It is difficult to determine identity or to elucidate what it consists of. Most explanations of regional identity are informed by social constructivist understanding; they view regional identity in terms of regional awareness and consciousness, shared values, a common understanding of the region and the common space, of its goals, and a sense of belonging and distinction between social groups. These explanations tend to amalgamate the meanings of regional identity in a rather abstract and vague understanding, sometimes referring to culture, religion, language, rhetoric discourse, collective practices and consensus. A real and systematic conceptualisation of the term is developed by Anssi Paasi. The starting point of his conceptualisation is that regions have not only a territorial

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<sup>109</sup> Hettne, B. and F. Söderbaum (2000). "Theorising the rise of Regionness". *New Political Economy* 5(3), p. 461-462.

<sup>110</sup> Fawn, R. (2009). *Op.Cit.*, p.13-14.

<sup>111</sup> Hettne, B. (1994). *Op.Cit.*, p.7.

<sup>112</sup> Riggiozzi, P. (2012). *Op.Cit.*, p.425.

<sup>113</sup> Hettne, B. and F. Söderbaum (2000). *Op. Cit.*, p.461.

<sup>114</sup> Beeson, M. (2005). "Rethinking regionalism: Europe and East Asia in comparative historical perspective". *Journal of European Public Policy* 12(6), p.972.

<sup>115</sup> Baert, F., Scaramagli, T. and Söderbaum, F. (2014). "Introduction: Intersecting Interregionalism". In: Baert, F., Scaramagli, T. and Söderbaum, F. (Eds). *Intersecting Interregionalism. Regions. Global Governance and the EU*. Springer. The Netherlands, p.8.

shape (vague or more explicit boundaries) but also a symbolic shape that manifests in social practice that produces and reproduces the region and which is used to construct the narratives of identity and to symbolise a region: the name of region, which meaning often results from political and cultural struggles, numerous other symbols such as coats of arms, songs, certain cultural, natural and institutional features, myths, etc.<sup>116</sup> For Björn, regional identity is dependent on history and shaped by conflicts.<sup>117</sup> It is partly constituted by the social, cultural practices and discourses, and symbolic boundaries that distinguish one region from another and partly by the personal meaning people attach to regions.<sup>118</sup> The regional identity of the inhabitants points out to the identification of the people with those practises, discourses and symbolisms that are institutionalised as part of the region.<sup>119</sup> It is a combined process of individuals' personal experiences with the collective narratives as a discursive form of distinction and categorisation between the people of the region and others. Regions and their identities are social and discursive constructs.<sup>120</sup> A region exists where actors define and promulgate a specific identity. Identity is not given; it is built and it changes.

Regionness *per se* is not enough to make a region. Institutional capacity is required for the making of a sustainable region.

#### 1.2.4. Regional cooperation

Regional cooperation is often described as inter - state cooperation across a wide range of issues including the social, economic, cultural, security, environmental, political, or military fields.<sup>121</sup> It is a form of dialogue that establishes contacts and meetings at the states level. Regional cooperation is essentially driven by states and it requires a willingness by states to make a minimum concession to gain the trust of others states within the region.<sup>122</sup> It can be formal and involve the creation of formal institutions, or informal and based on much looser structure

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<sup>116</sup> Paasi, A. (2011). "The region, identity, and power". *Procedia Social and Behavioural Sciences* 14, p.13

<sup>117</sup> Hettne, B. (1994). *Op.Cit.*, p.2.

<sup>118</sup> Zimmerbaum, K. and A. Paasi. (2013). "When old and new regionalism collide: Deinstitutionalisation of regions and resistance identity in municipality amalgamations". *Journal of Rural Studies* 30, p.33.

<sup>119</sup> *Ibid.*

<sup>120</sup> Zimmerbaum, K. and A. Paasi. (2013). *Op.Cit.*, p.31.

<sup>121</sup> Hettne, B. (1994). *Op.Cit.*, p.7.

<sup>122</sup> Kitipov, J. (2012). *Op.Cit.*, p.24.

involving patterns of regular meetings with some rules attached, together with mechanism for preparation and follow up.<sup>123</sup> A high level of institutionalisation is not a guarantee of either effectiveness or political importance.<sup>124</sup> Similarly, how much institutionalisation is necessary for effective and sustainable cooperation remains a contested issue, the APEC being a good example,<sup>125</sup> an organisation that started as an informal dialogue in 1989 and since became the premier in the Asia Pacific region. The advantage for regional cooperation through a formal institution is that it establishes a legal framework for cooperation that may regulate future needs for cooperation.<sup>126</sup> A regional institution contributes to setting more order in the relationships between the states in the region. It is often designed to enhance and consolidate the position of the states in the international system. Cooperation is seen as a means of increasing the influence and bargaining power of the region, but also its security and welfare.

One should understand regional cooperation in light of changes in the structure of the international system since the end of the Cold War, and the effect of the growing economic interdependence usually termed as globalisation. To start with the latter, regional cooperation helps to face challenges posed by globalisation and lay the foundation of sustainable development.<sup>127</sup> It has been seen as a key policy response to global (and regional) challenges such as climate change and environmental degradation, migration, economic and financial crisis, and transnational crime.<sup>128</sup> A well – developed cooperation as a new polity leads to regional integration, the process by which states within a particular region increase their level of interaction with regard to economic, security and political issues.<sup>129</sup> Integration is often rooted in a distinctive organisation, with difference to cooperation which essentially remains contingent on the political will of states. Therefore, regional integration is a union of states and the creation

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<sup>123</sup> Hurrell, A. (1995). *Op.Cit.*, p.336.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

<sup>126</sup> Hettne, B. (1994). *Op.Cit.*, p.7.

<sup>127</sup> Kurian, A.L. and C. Vinodan (2013). *Op.Cit.*, p.408-409.

<sup>128</sup> Heine, J. (2012). "Regional integration and political cooperation in Latin America". *Latin America Research Review* 47(3), p.217.

<sup>129</sup> Thonke, O. and A. Spliid. (2012). "What to expect from regional integration in Africa". *African Security Review* 21(1), p.45.

of supranational authority.<sup>130</sup> It is a process whereby nation states forgo the desire and ability to conduct foreign and key domestic policies independently of each other, seeking instead to make joint decisions or to delegate the decision – making process to new central organs.<sup>131</sup> This idea of a central institution with supranational features is put forward by many scholars. It describes regional integration as a process in which nations aim at creating a new centre with jurisdiction over the national states.<sup>132</sup> This implies that national states cede or pool their sovereignty to what Philippe C. Schmitter terms as a ‘higher order’ and polity capable of taking initiatives, making decisions and implementing rules without unanimous consent of all its member states.<sup>133</sup> It is only when a regional organisation becomes a regional polity, e.g. when it acquires some legitimate capacity, however limited, to act on its own initiating proposals, making decisions, and implementing policies that cooperation switches to integration.<sup>134</sup> These two terms are thus distinct though interconnected. Integration is a process and cooperation the initial stage of the process. In that sense, cooperation is the precursor of integration.<sup>135</sup> Cooperation is an attempt to adjust policies in a way that does not involve any immediate structural impact.<sup>136</sup> The theory of regional integration suggests that cooperation begins in relatively narrow areas before it eventually “spills over” into more areas and turns into integration.<sup>137</sup> Adhesion and exit from an integrative organisation can be costly with a possible restriction to exit, whereas adhesion and exit from a cooperative organisation may be costless. Therefore, the costs and benefits of the two processes make states naturally prefer loose cooperation in specific areas before they eventually realise the benefit of expanded and deeper cooperation leading to integration. This transformation occurs when states realise that cooperation arrangements are what Philippe C. Schmitter calls “cheap talks” and what other scholars refer to as “talk shops” or “talking shops”,

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<sup>130</sup> Fawcett, L. (2013). *The history and Concept of Regionalism*. United Nations University. Comparative Regional Integration Studies. Working Papers, p.6.

<sup>131</sup> Obydenkova, A. (2011). “Comparative regionalism: Eurasian Cooperation and European integration. The case for neofunctionalism”. *Journal of Eurasian Studies* 2, p.88.

<sup>132</sup> Kurian, A.L. and C. Vinodan (2013). *Op.Cit.*, p.401-402. Also, Obydenkova, N. (2011). *Op.Cit.*, p.88.

<sup>133</sup> Schmitter, P.C. (2007). *Regional cooperation and regional integration*. Essay. The European University Institute, p.4.

<sup>134</sup> *Ibid.*

<sup>135</sup> Obydenkova, A. (2011). *Op.Cit.*, p.88.

<sup>136</sup> *Ibid.*

<sup>137</sup> Mansfield, E. D. and E. Solingen (2010). *Op.Cit.*, p.157. Also, Thonke, O. and A. Spliid. (2012). *Op.Cit.*, p.61.

in their analysis of institutional change.<sup>138</sup> In this regard, most scholars argue that transformative change is often the result of unexpected events, internal or external, the latter having been examined by the theory of externalities and been termed as “inside – out effects” of international political, economic, environmental and cultural influences or “outside – in factors” that contribute to the expansion of a regional organisation.<sup>139</sup> Philippe C. Schmitter argues that the extension of cooperation and increase in the scope and authority of an organisation towards a more binding structure would essentially be favoured by the smaller or weaker states.<sup>140</sup> Indeed cooperation has been seen as a way of increasing security, welfare, influence, bargaining power in trade negotiation and hence enhancing the position of poor states along the integration process and saving them from marginalisation.<sup>141</sup> If benefits of a political cooperation are abstract and less obvious, those of an economic cooperation are material and apparent in terms of access to bigger, regional and global markets, economic growth and development, welfare and improved living standards, and poverty reduction. Economic cooperation was perceived as the key to achieving peace and consequently reducing, eliminating and preventing future conflicts among states in Europe, after the Second World War.<sup>142</sup> In her comparative analysis of the motives for cooperation in various regional organisations around the world, Sheila Page notes that trade is the most prevalent motive, compared to political cohesion, common history and conflicts.<sup>143</sup> Trade has been perceived as a means to increase interconnectedness among nations and to access global markets.<sup>144</sup>

There has been a proliferation of regional trade agreements, especially after the end of the Cold

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<sup>138</sup> Schmitter, P.C. (2007). *Op.Cit.*, p.11. Also, Jetschke, A. and T. Lenz (2013). “Does regionalism diffuse? A new research agenda for the study of regional organisation”. *Journal of European Public Policy*. 20(4), p. 633. And Fawcett, L. “Regionalism from a historical Perspective”. In: Farrell, M., B. Hettne et. al. (2005). *Op.Cit.*, p. 34.

<sup>139</sup> Hurrell, A. (2007). “One world? Many worlds? The place of regions in the study of international society”. *International Affairs*. 83(1), p.130. Also, Vayrynen, R. (2003). *Op.Cit.*, p.44.

<sup>140</sup> Schmitter, P.C. (2007). *Op.Cit.*, p.11,12.

<sup>141</sup> Kurian, A.L. and C. Vinodan (2013). *Op.Cit.*, p.407. Also, Hurrell, A. (2007). *Op.Cit.*, p.139; Mansfield, E. and H.V. Milner (1999). *Op.Cit.* p.614-615. And, Fawcett, L. (2008). *Op.Cit.*, p.11.

<sup>142</sup> Haastrup, T. (2013). “Eu as Mentor? Promoting Regionalism as External relations Practices in EU – Africa Relations”. *European Integration*. 35(7), p.791. Also, Mansfield, E. and H.V. Milner (1999). *Op.Cit.* p.614.

<sup>143</sup> Page, S. (2001). “Regionalism and/ or Globalisation”. *Regionalism and Regional Integration in Africa. A Debate of Current Aspects and Issues*. Uppsala. Nordiska Afrikainstitutet, p.12.

<sup>144</sup> Jordaan, A. (2014). “Regional integration in Africa versus higher levels of intra – Africa trade”. *Development Southern Africa*. 31(3), p.529.

War, to the extent that today there is perhaps no single state in the world that does not belong at least to one regional trade agreement and at least a third of the world's trade is conducted within the framework of regional trade agreements.<sup>145</sup> Regional trade agreements often aim at eliminating, removing or at least lowering national trade barriers, example customs tariffs and duties, and other non – tariff barriers such as regulatory restrictions to the free movement of goods, labour, services, capital and investments and manpower across national borders.<sup>146</sup> They provide states with preferential access to members' markets. Examples of such agreements include EU, NAFTA, MERCOSUR, ASEAN, or the EAC. A typology of trade arrangements is advanced by Thonke and Spliid<sup>147</sup> and includes:

- Preferential trade area where member states apply lower tariffs on imports for their products than those of third parties.
- Free trade area where member states remove tariffs on imports on other member states' products.
- Customs union as a free trade area with a common external tariff on imports.
- Common market as a customs union with free movement of factors of production, such as labour and capital.
- Monetary union or single currency with harmonisation of monetary policies.
- Political union where sovereignty is transferred to a supranational body, with common legislation and political structures.

The typology above reproduces the European linear integration model of sequential phases of integrating goods, labour and capital markets, and finally monetary and fiscal integration.<sup>148</sup> In this model, a preferential trade area leads to a free trade area, the latter produces a customs union, followed by a common market and a monetary and a political union. The European integration was built around the idea of economic community, with security and democratic

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<sup>145</sup> Schmitter, P.C. (2007). *Op.Cit.*, p.6. Also, Riedel, R. (2004). *Op.Cit.*, p.49.

<sup>146</sup> Mansfield, E. and H.V. Milner (1999). *Op.Cit.* p.592. Also, Riedel, R. (2004). *Op.Cit.*, p.49.

<sup>147</sup> Thonke, O. and A. Spliid. (2012). *Op.Cit.*, p.45.

<sup>148</sup> Staeger, U. (2015). *The European Union's Regionalism Diplomacy in Africa: An English School Approach*. UNU-CRIS. Bruges Regional Integration and Global Governance Paper 2/2015, p.14.

consolidation as the key priorities.<sup>149</sup> Economy and security have since emerged as the drivers of economic cooperation and the link between neighbouring states.

### 1.3. The meaning of regionalism

The processes explained above inform this thesis' understanding of regionalism. Taking into account the criticisms against early scholars' nationalistic understanding of regionalism, together with the dynamics that constitute it, this thesis views regionalism as a policy and a project that can operate both above and below the level of state.<sup>150</sup> Three considerations can be made in light of the above conception. Firstly, regionalism involves both states and non – state actors such as multinational corporations and private and non – governmental organisations. They collaborate in the coordination of strategies within the region. Regionalism at this double level is not just dictated by states through their leaders but it also takes into account informal social, economic, environmental, security practices and processes that are out of the realm of states and that transcend national borders.

Secondly, regionalism is a mode of governance and an approach to world order. Regional governance is thus an alternative and significant complementary layer of governance to the multiscale world order.<sup>151</sup> It may take any form ranging from intergovernmental cooperation, to overlapping interstate arrangements, regional federation, confederation or supranational organisation.

It is important, at this stage, to clarify the meaning of 'intergovernmental' and 'supranational', as two recurrent terms throughout this thesis. The two terms refer both to separate decision – making logics and procedures and to certain behavioural norms.<sup>152</sup> Intergovernmentalism refers to governments acting together to tackle collective problems.<sup>153</sup> It traditionally indicates the decision – making mode typical of important negotiations among heads of states and

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<sup>149</sup> Fawcett, L. (2004). *Op.Cit.* p.437.

<sup>150</sup> Fawcett, L. (2004). *Op.Cit.* p.433. Also, Fawcett, L. (2005). *Op.Cit.*, p.24.

<sup>151</sup> Fawcett, L. (2004). *Op.Cit.* p.431.

<sup>152</sup> Bickerton, C.J., D. Hodson and U. Puetter (2015). "The New Intergovernmentalism: European Integration in the Post – Maastricht Era". *JCMS* 53(4), p.707. Also see, Schimmelfenig, F. (2015), "What's New in 'New Intergovernmentalism'? A Critique of Bickerton, Hodson and Puetter". *JCMS* 53(4), p.724.

<sup>153</sup> Grigorescu, A. and C. Baser (2019). "The choice between intergovernmentalism and nongovernmentalism. Projecting Domestic Preferences to Global Governance". *World Politics* 71(1), p.90.

governments taking place in informal or institutionalised settings.<sup>154</sup> In an intergovernmental structure, all critical decisions must be agreed by each government.<sup>155</sup> It entails a substantial amount of unanimous voting.<sup>156</sup> When a group of nations creates an organisation or enters any other form of international arrangement, they usually expect operational decision – making to be unanimous.<sup>157</sup>

The concept of supranationalism has a broad and flexible connotation that could encompass international, transnational, or even global.<sup>158</sup> Supranationalism literally means over and above states or nations, suggesting that decisions are made by a process or an institution that is largely (but not entirely) independent of national governments.<sup>159</sup> It involves in most instances the use of majority voting.<sup>160</sup> A distinction can be made between normative and decisional supranationalism. Normative supranationalism entails the supremacy of the organisation's laws over those of the constituent states.<sup>161</sup> Decisional supranationalism relates to the institutional framework and decision – making processes by which the organisation's laws and policies are initiated, debated, formulated, promulgated and enforced.<sup>162</sup>

Regionalism is a feature of the world order or the international system and an alternative to unilateralism and to globalism, universalism or internationalism.<sup>163</sup> It sets in as a new way through which international cooperation is being organised to deal with regional and global challenges be they transnational crime, climate change, or trafficking in drugs and human beings, etc.<sup>164</sup> The

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<sup>154</sup> Piattoni, S. (2016). "The European Union between Intergovernmentalism and 'Shared and Responsible Sovereignty': The Haptic Potential of EMU's Institutional Architecture (The Government and Opposition? Leonardo Schapiro Lecture, 2016)". *Government and Opposition* 52(3), p.388.

<sup>155</sup> Sieberson, S.C. (2010). "Inching toward EU Supranationalism? Qualified Majority Voting and Unanimity under the Treaty of Lisbon". *Virginia Journal of International Law* 50(4), p.923.

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.*, p.932.

<sup>158</sup> Riyanto, S. (2017). "The Emergence of Universalism and the Decline of Supranationalism". *Mimbar Hukum* 29(2), 376.

<sup>159</sup> Rukanova, B., R.T. Wigand, E. van Stijn and Y-H Tan (2015). "Understanding transnational information systems with supranational governance: A multi – level conflict management perspective". *Government Information Quartely*, p.185.

<sup>160</sup> Sieberson, S.C. (2010). *Op.Cit.*, p.923.

<sup>161</sup> Leal-Arcas, R. (2007). "Theories of Supranationalism in the EU". *The Journal of Law in Society* 8(1), p.97.

<sup>162</sup> *Ibid.*

<sup>163</sup> Kurian, A.L. and C. Vinodan (2013). *Op.Cit.*, p.404.

<sup>164</sup> Heine, J. (2012). *Op.Cit.*, p.217.



end of the Cold War and the removal of superpowers overlay transformed the international security environment and made regions more vulnerable.<sup>165</sup>

Thirdly, regionalism is a type of world order that provides states with a means for balancing against large powers or bandwagoning with them.<sup>166</sup> As such, it is an ideological project for the construction of a regionalist order in a specific region.<sup>167</sup> It enhances the global power and influence of the region, as well as its capacity as an actor. Hettne explains this as an extended nationalism, a large political structure within which nation states perform specific functions.<sup>168</sup> The grouping of states in regionalism aims at forming a new polity, a distinct political entity that influences developments within their own area and creates norms, rules, values, moral ideas, practices and procedures which are informed by the practices of other regional and global settings.<sup>169</sup> Regional norms are either legal defining dimensions such as universal human rights, minority rights, rule of law, democracy, governance, accountability, transparency, or institutional and setting periodical consultations, common secretariat, etc. Their institutional embedment consolidates the region making it play a defining role in its relationship with the rest of the world and form the organising basis for policy within the region and across a range of issues.<sup>170</sup> Normative regions examples include the EU which promotes universal norms and values mentioned above. Other distinctive norm subsidiarity regions include Latin America's non – intervention, Asia's non – alignment norm, the ASEAN's consensus approach based upon strict observance of sovereignty (also termed 'ASEAN way'), and Africa's norm of inviolability of post – colonial boundaries and its humanitarian intervention under Article 4(h) of the Constitutive Act of the African union.<sup>171</sup>

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<sup>165</sup> Fawcett, L. (2013). *Op.Cit.*, p.11

<sup>166</sup> Fawcett, L. (2008). *Op. Cit.* p.13.

<sup>167</sup> Puntigliano, R.A. (2013). "Geopolitics and Integration. A South American perspective. In: Puntigliano, R.A. and J. Briceño Ruiz (Eds). *Resilience of Regionalism in Latin America and the Caribbean*. Hampshire. Palgrave Macmillan, p.21.

<sup>168</sup> Hettne, B. (1994). *Op.Cit.*, p.36.

<sup>169</sup> Fawcett, L. (2004). *Op.Cit.*, p.429.

<sup>170</sup> Hurrell, A. (2007). *Op.Cit.*, p.130.

<sup>171</sup> Acharya, A. (2012). "Comparative Regionalism: A Field Whose Time has Come". *The International Spectator*. 47(1), p.11.

#### 1.4. The practice of regionalism worldwide

In order to understand how regionalism has been operating in different parts of the world, a historical account of its origins and development over the years needs to be established.

##### 1.4.1. Origins of regionalism

Most scholars assert that the origins of regionalism date back in the 19<sup>th</sup> century. Many of the explanations reflect a rather Eurocentric approach to the phenomenon of regionalism and fail to account for what Acharya A. calls ‘the global heritage’ of regionalism.<sup>172</sup> The same explanations also fail to account for different dimensions, example political and social, than security or economic concerns dealt with in Europe in the 19<sup>th</sup> century. Regionalism in the latter century manifested in the form of alliances and leagues that formed the Concert of Europe, an interstate Westphalian balance of power mechanism that preserved peace and regulated regional relations in Europe then. Such alliances include the Quadruple Alliance of Great Britain, Austria, Prussia, Russia and France in 1818 and subsequent coalitions that opposed the great powers until the first World War: the Triple Alliance of Germany, Austria – Hungary and Italy in 1882, the Entente Powers linking the Russian Empire, the French Third Republic and Great Britain developed from the Franco – Russian Alliance in 1894, the Anglo – French *Entente Cordiale* of 1904 and the Anglo – Russian agreement of 1907 which brought the Triple Entente into existence.<sup>173</sup> Another manifestation of regionalism in Europe in the same period is the creation of various German exclusive economic and political blocks as early as 1818: the Bavaria Wurttemberg Customs Union, the Middle German Commercial Union, the German Zollverein, the North German Tax Union, the German Monetary Union and the German Reich.<sup>174</sup> Other customs union were established by Austrian states in 1850, Switzerland in 1848, Denmark in 1853 and Italy in 1860.<sup>175</sup> Intra – European trade developed dramatically and constituted a considerable portion of global trade, supported by the industrial revolution and consequent technology development.<sup>176</sup> The outbreak of World War I in 1914, sparked by the tensions among the alliances, dismantled the

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<sup>172</sup> *Ibid.*, p.6.

<sup>173</sup> Fawcett, L. (2008). *Op.Cit.*, p.4.

<sup>174</sup> Mattli, W. “Explaining regional integration outcomes”. *Journal of European Public Policy* 6(1), p.1.

<sup>175</sup> Mansfield, E. and H. V. Milner. (1999). *Op.Cit.*, p.596.

<sup>176</sup> Kurian, A.L. and C. Vinodan (2013). *Op.Cit.*, p.398.

Concert of powers and disrupted the growth of regional trade arrangements in Europe.<sup>177</sup>

Early manifestations of regionalism are also described with reference to Latin America where it emerged in the 19<sup>th</sup> century after the newly born South American republics gained independence in the early 1800s and through their shared sense of community, history and values.<sup>178</sup> The ideas of unity, common roots, language, customs, religion, culture and identity as a result of three hundred years of colonisation by Spain were advanced by South American leaders and thinkers including Simón Bolívar, Juan Bautista Alberdías, Francisco de Miranda, and Francisco Morazan and culminated to a series of Congresses from 1826 to 1865, that viewed the signing of a number of treaties for achieving cooperation on the basis of federation and confederation.<sup>179</sup> If the latter attempts to a federated South America did not succeed due to rising nationalism and internal rivalries among the states, they constituted the basis for future development.

#### 1.4.2. Regionalism over the year

Regionalism's worldwide progression is often explained in terms of waves or episodes. Whereas scholars recognise different waves of regionalism, their descriptions often diverge on the number of the waves. This, I noticed, is often because many studies do not provide criteria in their analysis of regionalism's episodes and the correlation between the criteria and the course of regionalism. Surely, the progression of regionalism needs to be considered in conjunction with major global events that marked the world order. This chapter considers World War I and II, Cold War, the end of Cold War and subsequent environment as turning point for the waves of regionalism here understood as interstate cooperation.

##### 1.4.2.1. First regionalism wave

While the leagues, alliances, federations and customs unions were formed in the 19<sup>th</sup> century as manifestations or expressions of regionalism, the first wave of regionalism in the real sense appeared after the First World War. Regionalism is considered to have arisen after the First World War and expanded after the Second.<sup>180</sup> The establishment of the League of Nations in 1920, in

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<sup>177</sup> *Ibid.*

<sup>178</sup> Gardini, G. L. (2012). *Op.Cit.*, p.53.

<sup>179</sup> *Ibid.*, p.53-54.

<sup>180</sup> Fawn, R. (2009). "Regions' and Their Study: Wherefrom, What for and Whereto?". *Review of International Studies*. 35, p.7.

the wake of the First World War represents the first attempt at a universal legal basis for regional organisations, at least theoretically, considering the controversial character of the League and its poor results. The League's Covenant expressly recognised the validity of "regional understandings ... for securing the maintenance of peace."<sup>181</sup> This provision could be interpreted as an implicit recognition of the principle of regionalism by the League of Nations.<sup>182</sup> Regional arrangements created between the World War I and II tended to be highly security partisan, for example the Locarno treaties in 1925, the Little Entente between 1920 and 1921, the Four Power Pact and the Balkan Union of 1934.<sup>183</sup> Some of them aimed at consolidating the empires of major powers and were highly discriminatory and preferential, including the customs union France formed with members of its empire in 1928 and the Commonwealth system of preferences established by Great Britain in 1932.<sup>184</sup> There is a widespread consensus that the experience of regional arrangements formed in the inter – war period was negative and constituted of closed trading blocks that led to the global depression.<sup>185</sup> Despite the failure of the League to obtain universal acceptance as a global security institution, it has the merit for setting the debate about regionalism which will be later on taken up by the UN at the conclusion of the Second World War.<sup>186</sup>

#### 1.4.2.2. *Second regionalism wave*

The end of the Second World War represents the start of a second wave of regionalism that lasted until the sixties. The war demolished the world order and divided it into two spheres competing for influence.<sup>187</sup> The failure of the League prompted the need to build another international organisation for peace and security.<sup>188</sup> Thus, the newly created set of institutions, namely the UN and the Bretton Woods institutions intended to provide security and some degree of economic

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<sup>181</sup> Goodrich, L. M. (1949). "Regionalism and the United Nations". *The United States and the Atlantic Community*. 23(3), p.47.

<sup>182</sup> Yalem, R. J. (1962). "Regionalism and the World Order". *International Affairs*. 38(4), p.461.

<sup>183</sup> Kurian, A.L. and C. Vinodan (2013). *Op.Cit.*, p.398.

<sup>184</sup> Mansfield, E. D. and H. V. Milner (1999). *Op.Cit.*, p.597.

<sup>185</sup> Fawn, R. (2009). *Op.Cit.*, p.7.

<sup>186</sup> Schreuer, C. (1995). "Regionalism v. Universalism". *European Journal of International Law* 6(1), p.477.

<sup>187</sup> Fawcett, L. (1995). "Regionalism in Historical Perspective". In: Fawcett L. and A. Hurrell (Eds). *Regionalism in world politics: Regional organisations and international order*. Oxford. Oxford University Press, p.12.

<sup>188</sup> Goodrich, L. M. (1949). *Op.Cit.*, p.48.

stability to sovereign nation – states.<sup>189</sup> Whereas, the League of Nations was inspired by idealism as an approach to world order with security, peace and economic development on a global scale, the dominant thinking at the creation of the UN was realism with its vision of international anarchy in which states are in a situation of permanent cold or hot war.<sup>190</sup> This characterised the debate, at the adoption of the Charter of the UN, between proponents of universalism and those of regionalism, in relation to a possible role for regional organisations in the maintenance of peace and security, a function predominantly perceived then to be entrusted at the universal level with the UN.<sup>191</sup> The UN Charter eventually recognised regional arrangements and defined their relationship with the UN, giving them a second role to the Security Council and clearly establishing a hierarchy in favour of the primacy of the latter to the former.<sup>192</sup> Whereas under Chapter VIII, article 52 of the Charter establishes the legality of such arrangements if consistent with the purposes and principles of the UN, article 53 stipulates that regional enforcement action is subject to the prior approval of the Security Council except in cases involving enemy States of the Second World War; and article 54 obliges regional arrangements to keep the Security Council informed of any action they may contemplate for the maintenance of peace and security. Other important references to regional action in the Charter include article 33 exhorting member states to resort first to regional agencies in seeking the peaceful settlement of disputes before submitting them to the UN; and article 51 establishing the right for (individual and) collective self – defence against armed aggression, thus providing a legal basis for the use of force by member states, in case of an armed attack, without any requirement for authorisation of the Security Council.

The post – Second World War world order was built on the pillars of multilateralism and sovereignty.<sup>193</sup> In this period, the concept and practice of regionalism expanded dramatically; it entered the vocabulary of international relations and established firmly.<sup>194</sup> One important feature of post - Second World War regionalism is the rise of formal institutions at the regional level.

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<sup>189</sup> Hurrell, A. (2007). *Op.Cit.*, p.129.

<sup>190</sup> Kurian, A.L. and C. Vinodan (2013). *Op.Cit.*, p.405. Also, Fawcett, L. (1995). *Op.cit.*, p13.

<sup>191</sup> Fawcett, L. (2013). *Op.Cit.*, p.6. Also, Acharya A. (2012). *Op.Cit.*, p.6.

<sup>192</sup> Fawcett, L. (2013). *Ibid*

<sup>193</sup> Hurrell, A. (2007). *Op.Cit.*, p.129.

<sup>194</sup> Fawcett, L. (2013). *Op.Cit.*, p.3, 10.

Among the pioneers in this regard, the LAS is the first institutionalised regional cooperation initiative in this period, established in 1945 to advance the economic, political, cultural and religious national interests of its members; and the OAS, formally created in 1948, for the purposes of regional solidarity and cooperation among the member states. The creation of the ECSC in 1951 (intended to revive the coal and steel industries and to link the member states across Europe in order to make war not only unthinkable but also impossible) was the first attempt to create a supranational organisation, together with the formation of the European Economic Community in 1957, considerably prompted regionalism around the world and attracted a significant attention from scholars in the Western world.<sup>195</sup>

Shortly after the first stage of European regionalism, the Latin America Free Trade Area was established in South America, in 1960, by Argentina, Brazil, Chile, Mexico, Paraguay, Peru and Uruguay (reorganised into the ALADI, in 1980). The CACM was established in 1960 by the Organisation of Central American States, to facilitate regional economic development through free trade and the adoption of a uniform Central American Tariff. CACM was reformed later on in 1991 into the Central American Integration System. The Andean Community of Nations, CAN, also referred to as Andean Pact, is another formal institution and regional organisation formed in Latin America, in 1969, after the European experience.

In Asia and in Africa, an array of regional arrangements was set off at the background of decolonisation that then expanded the international arena. The ASEAN founded in 1967 represented a different model of regionalism that was, unlike most regional arrangements born after the Second World War and reproducing the European model, built on different approaches that were later on called 'ASEAN way'.<sup>196</sup> The OAU, established in 1963 out of the decolonisation movement, was considered as a political reaction to colonial rule and apartheid.<sup>197</sup> Of the early post – war regional arrangements, a distinction is often made between micro – sub regional

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<sup>195</sup> Schmitter, P. C. (2007). *Op.Cit.*, p.1-2.

<sup>196</sup> ASEAN does not aim at integration of the bloc. It emphasises identity, common culture, values and interests and it relies on mutual respect, non – interference in each other's internal affairs, a norm of consultation and national resilience to thwart off internal threats to governments.

<sup>197</sup> Haastrup, T. (2013). "EU as Mentor? Promoting Regionalism as External Relations Practice in EU – Africa Relations". *European Integration* 35(7), p.787

organisations focusing on economy, such as the EC, ANDEAN, ASEAN, CACM and macro – regional political bodies concerned with controlling conflicts.<sup>198</sup> The latter category is also described by Fawcett as multi – purpose institutions.<sup>199</sup> It includes NATO, the OAU, the OAS and the LAS. The emergence of these continental regionalist schemes and of many other regional arrangements is associated with the formation of ‘pan’ movements and ideologies aimed at strengthening unity among the nations and founded on shared conceptions of history and culture.<sup>200</sup> Pan – Americanism, pan – Africanism, pan – Arabism and pan - Asianism became institutional frameworks to promote cooperation among sovereign states.<sup>201</sup> They were advanced by leaders such as Kwame Nkrumah in Africa, Nasser in the Arab world, Aung San in Southeast, Nehru in India, as well as well as writers, poets, artists, etc.<sup>202</sup>

Whatever economic or social underlying rationale of regional schemes after the Second World War, regionalism was fundamentally shaped by security imperatives of the Cold War that had constrained regional organisations to the dependence of superpowers.<sup>203</sup> Peace, security and development were delivered regionally by the institutions on both sides of the East – West divide.<sup>204</sup> Some states in the developing countries, concerned by the desire to detach themselves from the influence of superpowers sought to establish regional arrangements, mostly free trade areas, to reduce their dependence on advanced industrialised countries.<sup>205</sup> Most of these regional arrangements were inherited from the colonial powers and tendered to reproduce the fundamental cleavage of the Cold War and subsequent uneven development with political tensions as a result.<sup>206</sup> Examples include the East African Cooperation, established in 1967 as a customs union and built upon colonial infrastructures, which did not survive the ideological differences of the leaders of the Partner States and collapsed ten years later;<sup>207</sup> the ECOWAS was

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<sup>198</sup> Hurrell, A. (1995). *Op.Cit.*, p.331. Also, Vayrynen, R. (2003). *Op.Cit.*, p.26.

<sup>199</sup> Fawcett, L. (2013). *Op.Cit.*, p.9-10.

<sup>200</sup> Acharya, A. (2012). *Op.Cit.*, p.5. Also, Hurrell, A. (2007). *Op.Cit.*, p.137.

<sup>201</sup> Fawcett, L. (2013). *Op.Cit.*, p.9.

<sup>202</sup> Acharya, A. (2012). *Op.Cit.*, p.5-6.

<sup>203</sup> Hettne, B. (1994). *Op.Cit.*, p.13.

<sup>204</sup> Fawcett, L. (2013). *Op.Cit.*, p.13.

<sup>205</sup> Mansfield, E. and Milner, H. V. (1999). *Op.Cit.*, p.600.

<sup>206</sup> Hettne, B. (1994). *Op.Cit.*, p.41

<sup>207</sup> Pirozzi, N. and A. Godsäter. (2015). *The EU and Africa: Regionalism and interregionalism beyond institutions. Atlantic Future*. Working paper 26, p.6.

established in 1975, the CARICOM, which existence dates back in 1958 with the establishment of the West Indies federation, the Caribbean Free trade Association in 1965 and the Eastern Caribbean Common market, was founded in 1973 as an economic and trade regional organisation. Most regional arrangements in developing countries at the time were protectionist of their national industries.<sup>208</sup> They grew out of import – substitution policies actively promoted by policymakers with the support of the UN Economic Commissions.<sup>209</sup> They were judged as trade diverting, as opposed to trade creating structures in the developed countries and especially the EC.<sup>210</sup> Regionalism remained on the political agenda in the bipolar world order, throughout the Cold War.<sup>211</sup> Beside economic stability, regional integration was shaped by security imperatives, reflecting a neo – realist power politics with its view on international anarchy and material calculation of power and security..<sup>212</sup> A few regional groupings formed with a particular threat in mind: South Africa in the SADCC in 1980, Iran for the GCC in 1981 and Iraq for the short – lived ACC in 1989.<sup>213</sup> In the SAARC formed in 1985, the dominant power, India, was associated with the Soviet Union whereas the rest of the countries leaned towards the United States.<sup>214</sup> Scholars distinguish regional schemes during the Cold War in terms of their potentially benign cast or pernicious effects. Regional schemes that promoted international economic stability and peace are considered benign; those which malevolent mercantilist objectives degraded economic welfare and fostered inter – state conflicts were judged as malign.<sup>215</sup> There is a consensus among scholars that regional schemes formed between the First and the Second World Wars, especially Nazi Germany and Japan’s attempts to establish discriminatory regionally based political orders and trade relations were malign forms of regionalism, as opposed to benign nineteenth century’s regional arrangements and those after the Second World War.<sup>216</sup>

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<sup>208</sup> See Puntigliano, R.A. (2013). *Op.Cit.*, p.41.

<sup>209</sup> Mansfield, E. and H. V. Milner. (1999). *Op.Cit.*, p.604.

<sup>210</sup> Jordaan, A. (2014). *Op.Cit.*, p.518.

<sup>211</sup> Fawcett, L. (1995). *Op.Cit.*, p.16.

<sup>212</sup> Hettne, B. (1994). *Op.Cit.*, p.13.

<sup>213</sup> Fawcett, L. (2008). *Op.Cit.*, p.7.

<sup>214</sup> Hettne, B. (1999). *Op.Cit.*, p.34.

<sup>215</sup> Mansfield, E. and H. V. Milner. (1999). *Op.Cit.*, p.612.

<sup>216</sup> Mansfield, E. and H. V. Milner. (1999). *Op.Cit.*, p.612. Also, Beeson, M. (2005). *Op.Cit.*, p.971.



### 1.4.2.3. *Third wave of regionalism*

A turning – point in the history of regionalism occurred from the 1980s. A new wave of regional arrangements was formed against the backdrop of important changes in the world order. Firstly, a growing interdependence together with infrastructure development and information technology generated increased interconnection between states and rising flows of transactions, ideas, values, and knowledge across borders.<sup>217</sup> Many regions experienced a resurgence of questions of identity and belonging, an increased regional awareness and consciousness that induced the need for cooperation.<sup>218</sup> In Central Africa, the ECCAS was established in 1983 as a common market bringing together members of the Central African Customs and Economic Union (UDEAC in French)<sup>219</sup> and those of the Economic Community of the Great Lakes Countries (CEPGL in French).<sup>220</sup> In South Western Asia, Iran, Pakistan and Turkey, identified as non – Arab states with Islam as the predominant religion and with historical ties and cooperation tradition, created the ECO in 1985 and expanded it later on in 1992 to include some of the former USSR republics among Islamic countries of Central and South Asia. The AMU too, in Northern Africa, was created in 1989, essentially as an economic cooperation among the member states.

Not least, the passing of the Single European Act in 1986 led to a perception of a coming ‘Fortress Europe’ with high tariff walls against third states.<sup>221</sup> The integration process in Europe was seen as a threat to the global trade system and it caused the rise of competitive regional building as a reaction elsewhere in the world.<sup>222</sup> Explained from another angle, the success of the EC, and later on the EU, and its establishment as a powerful international actor not only contributed to the expansion of regionalism but also exported and diffused it worldwide as a model for regional cooperation.

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<sup>217</sup> Hurrell, A. (1995). *Op.Cit.*, p.345.

<sup>218</sup> *Ibid.*, p.332.

<sup>219</sup> The Central African Customs and Economic Union (UDEAC) was founded in 1966, superseding the 1959’s Equatorial Customs Union (*Union Douanière Equatoriale*, UDE) that was established before the independence among Central African Republic, Congo, Gabon and Chad. The UDEAC was superseded by the Central African Economic and Monetary Community in 1994, a customs and monetary union among the former French colonies in Central Africa.

<sup>220</sup> The Economic Community of the Great Lakes Countries was created in 1976 to promote trade and development between Burundi, Rwanda, and the Democratic Republic of Congo.

<sup>221</sup> Bøås, M. (2001). *Op.Cit.*, p.30.

<sup>222</sup> Hettne, B. (1994). *Op.Cit.*, p.12.

Secondly, the end of the Cold War decentralised the international system and removed the influence of superpowers in many parts of the world. The new international scenario set regions free from the effects of global security dynamics and incited states within a region to deal with their own problems.<sup>223</sup> The turn from a pervasive bipolar world order to a multipolar system, the interest for regionalism by states such as the United States, China, Japan and Iran that previously eschewed it, opened more opportunities to other states to deal with their own foreign policies.<sup>224</sup> In Central East Europe, The CEI formed in 1989 among 18 central Eastern and South Eastern European states; the Visegrad Group too was established in 1991 among the Czech Republic, Hungary, Poland and Slovakia. The two organisations essentially aimed at facilitating the integration of their members in the EU, an economic growth and human development objective having since been added to the CEI's portfolio.

A number of regional arrangements were formed among central Asian states too since the breakup of the Soviet Union in 1991. The CIS, was established in 1991 by Russia and eleven other former Soviet republics as an Economic Union, with a free trade area among a few of them. The Central Asian Economic Union created in 1994 was transformed into the CACO in 2002. The Eurasian Economic Community established in 2000 was terminated in January 2015 and transformed into the Eurasian Economic Union in May 2014. The CSTO created in 2002 is an intergovernmental military organisation among CIS members.

Thirdly, global economic changes under the GATTs/WTO multilateral trading system, the opening and deregulation of market, together with the promotion of competition spurred regional trade agreements in the 1990s as an attempt to seize common problems among states with similar economy and facing many same economic problems.<sup>225</sup> The United States, together with Canada and Mexico, established the NAFTA in 1994, expanding a free trade agreement previously concluded with Canada in 1989. A notable regional grouping, the APEC was established in 1989

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<sup>223</sup> Hurrel, A. (2007). *Op.Cit.*, p.131.

<sup>224</sup> Hettne, B. and A. Inotai (1994). *The New Regionalism. Implications for global and International Security*. The United Nations University. World Institute for Development Economics Research (WIDER). Forssan Kirjapaino Oy, p. vii.

<sup>225</sup> Heine, J. (2012). *Op.Cit.*, p.212. Also, Fawcett, L. (2008). *Op.Cit.*, p.4. And, Kurian, A.L. and C. Vinodan (2013). *Op.Cit.*, p.403.

by Australia, New Zealand, Japan, South Korea, Canada, the United States and the ASEAN states. The Common Market of the South (MERCOSUR), in South America, came to existence in 1991, establishing a common market and promoting free movement of goods, services and people among the states. Another notable regional organisation is the IORA launched in 1997 with the aim of promoting trade liberalisation and cooperation among the members. In Africa, the West African Economic and Monetary Union (UEMOA in French) was established in 1994 among seven West African French speaking states sharing the same currency, the CFA Franc. The COMESA was also established the same year as a free trade area among the members. The proliferation of regional arrangements in this last wave is also attributed to a revival of regional ideas following the Asian financial crisis and the failure of the universal system of the UN to guarantee peace and stability, especially its unsuccessful peace operations in Somalia and Rwanda, all of which revealed the need for strengthening economic and security structures and prompted states to fill in gaps resorting to regional arrangements worldwide.<sup>226</sup> This last wave of regionalism departs from the previous waves in many ways. It is more ambitious encompassing not only economic and security but also political dimensions.<sup>227</sup> It emphasises the interests of regions and is shaped by issues of identity and belonging.<sup>228</sup> It is referred to as 'new regionalism' as opposed to old closed and protectionist regional arrangements.<sup>229</sup>

The new regionalism is more open and is characterised by an expansion of regional arrangements in their number and their membership.<sup>230</sup> Not only have new regional arrangements set in increased proportion but existing ones have also extended their membership to new participants. The new regionalism appears not as a state's monopoly anymore but as inclusive of the civil society's participation, however marginal role, in matters such as peace and security long perceived by states as touching their sovereignty and thus justifying exclusion or at least restriction of non – state actors' involvement.<sup>231</sup> This involvement of the civil society was described by Hettne, in his conceptualisation of regionness, as the fourth level of a region or a

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<sup>226</sup> Fawcett, L. (2008). *Op.it.*, p.9.

<sup>227</sup> Hettne, B. (1994). *Op.Cit.*, p.2.

<sup>228</sup> *Ibid.*, p.2, 41.

<sup>229</sup> Riggirozi, P. (2012). *Op.Cit.*, p.424.

<sup>230</sup> Fawcett, L. (2013). *Op.Cit.*, p.11-12. Also, Fawn, R. (2009). *Op.Cit.*, p.9. And, Fawcett, L. (2005). *Op.Cit.*, p.31.

<sup>231</sup> Acharya, A. (2012). *Op.Cit.*, p.11-12.

regional civil society which takes place when the organisational framework promotes social communication and convergence of values throughout the region.<sup>232</sup>

The last wave of regionalism is also marked by the relaunch of a few old regional schemes that had eroded and a change in their names.<sup>233</sup> The EC changed into the EU with the Treaty of Maastricht in 1993; the SPF, an economic cooperation organisation founded in 1971 was changed to the PIF in 2000 to better reflect the geographic location of its members in the north and south Pacific; the OAU became the AU in 2002; the customs union of southern African states, with its long history dating back in 1889 as the world oldest customs union, was renegotiated after the independence of Namibia and the end of apartheid in 1994 and formally established as the SACU in 2002; the SADCC was transformed into the SADC in 1992; the IADD was superseded by the IAD in 1996; and the East African Cooperation was renamed the EAC in 1999. Another characteristic of the new regionalism is the wide range of activities and missions covering new issue areas including transnational challenges such as climate change, financial volatility, pandemics, natural disasters which were not in the realm of old schemes.<sup>234</sup> For example, the SCO, founded in 2001, extended its primary security alliance objective to amongst others trade and economy, culture, energy and environmental protection. A social dimension and an emphasis on development is also noticed in a few regional arrangements such as the Bolivarian Alliance for the Peoples of our America (ALBA in Spanish),<sup>235</sup> a bloc of Caribbean and Latin American states formed in 2004 to address poverty, inequality, exclusion and climate change; and the Community of Sahel – Saharan States (CEN – SAD in Arab), an economic regional organisation of Sahel and Sahara states in Africa, established in 1998 and promoting social and cultural development among the members and other Arab and African states.

## 1.6. Theorising regionalism

In the words of Francis Baert *et al*, theories help us make sense of the world around us.<sup>236</sup>

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<sup>232</sup> Hettne, B. (1994). *Op.Cit.*, p.8.

<sup>233</sup> Fawcett, L. (2008). *Op.Cit.*, p.10.

<sup>234</sup> Acharya, A. (2012). *Op.Cit.*, p.10-11.

<sup>235</sup> Rigiroszi, P. (2012). *Op.Cit.*, p.423, 426, 434.

<sup>236</sup> Baert, F., Scaramagli, T and F. Söderbaum. (2014). *Op.Cit.*, p.3.

### 1.6.1. Old regionalism's theories

A wide array of theories has been set up to explain regionalism since the early ages of the ECSC to date. A glance at the various theoretical stances suggests that regionalism needs to be understood in the context of the world order, a view that is essentially put forward by political economy structuralist or systemic theories. In that sense, major politico – economic events in the last decades, such as the Second World War and the collapse of communism and subsequent end of the Cold War have influenced the elaboration of theories explaining regionalism.

The Second World War divided the world in two conflicting blocs. Realism became the predominant paradigm in international relations, with the view that the international system is an anarchy and that states live in a permanent situation of conflict.<sup>237</sup> Having observed that some of the basic functions of the state, such as ensuring security and welfare, were transferred to supranational organisations, David Mitrany pioneered regional integration theories devising functionalism theory and explaining that such transfer progressively increased interdependence among states and made conflict between them a remote possibility.<sup>238</sup> The central idea of Mitrany functional theory is a break from the realist paradigm that the world order is based solely on competition between states and that conflict is a dominant element of international relations.<sup>239</sup> The creation of the ECSC and, later, the EEC are examples of the functional nature of regional cooperation organisations.<sup>240</sup>

Mitrany's functionalism ideas that integration must take place in the economic realm rather than political were challenged by Ernst Hass's neofunctionalism arguing that high levels of economic interdependence lead to greater political integration, a mechanism that he termed "spillover effect".<sup>241</sup> Neofunctionalists believed that integration in one area expands to other areas in a contagious way, for example economic, social, and political integration.<sup>242</sup> For neofunctionalists,

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<sup>237</sup> See, Simma, B. and A.L. Paulus. (1998). "The "International Community": Facing the Challenge of Globalisation". *European Journal of International Law* 9, p.269.

<sup>238</sup> López Vidal, L. (2008). *Op.Cit.*, p.38.

<sup>239</sup> *Ibid.*

<sup>240</sup> *Ibid.*

<sup>241</sup> See, Mattli, W. and A.S. Sweet (2012). "Regional Integration and the Evolution of the European Polity: On the Fiftieth Anniversary of the Journal of Common Market Studies". *JCMS* 50 (S1), p.5.

<sup>242</sup> See, Mansfield, E. D. and E. Solingen (2010). *Op.Cit.*, p.157.

regional organisations are created to deal with economic issues of common interest, such as coal and steel, sometimes take on political functions, such as security and defence.<sup>243</sup> Neofunctionalism, was created specifically to explain the European integration and to apply the same assertion to all other regional processes outside Europe. The failure of the European Political Community and European Defence Community proposals in 1952, political crisis and the absence of tangible results in regionalist processes outside Europe prompted neofunctionalists to abandon their theory after Haas acknowledged that the theory was obsolete in Europe and obsolescent, though still useful, in the rest of the world.<sup>244</sup>

Another theory emerged, intergovernmentalism, propelled by Stanley Hoffmann and challenging and rejecting the spillover effect of neofunctionalism. Intergovernmentalist theory opposed the federal integration model. Its tenet is that nation - states remain the main actors of the international system. In that sense, intergovernmentalist theory is close to realism. For intergovernmentalist theories though, states create supranational organisations to coordinate issues of low politics, such as economic policies, but not to deal with those of high politics, such as security and diplomacy.<sup>245</sup> Intergovernmentalist theories assert that states supervise the decisions made by the same supranational organisations they create and to which they transfer some degree of sovereignty.<sup>246</sup> Hoffman's theories were proven right as the EEC increasingly moved towards an intergovernmental cooperation.

#### 1.6.2. New approaches to regionalism

With the growing interdependence and interconnection among states in the 1980s, Robert Keohane introduced neoliberal institutionalism as a model based on the realist theory of the centrality of states and assigning an important role to supranational organisations.<sup>247</sup> Keohane's neoliberal institutionalism can be understood within the general framework of institutionalism in International Relations theories. It is the most well – developed literature on international

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<sup>243</sup> *Ibid.*

<sup>244</sup> Fawcett, L. (1995). *Op.Cit.*, p.14.

<sup>245</sup> López Vidal, L. (2008). *Op.Cit.*, p.40.

<sup>246</sup> *Ibid.*

<sup>247</sup> *Ibid.*

institutions.<sup>248</sup> Arthur Stein asserts that neoliberalism is a scholarly branding product for differentiation and a moniker to institutionalism.<sup>249</sup> Although institutionalism shares many of realism's assumption about the world order – that it is anarchic, and that states are self – interested, rational actors -, it reaches a radically different conclusion : that cooperation between nations is possible.<sup>250</sup>

Institutionalists define institution as a set of rules, norms, practices and decisions – making procedures that shape expectations.<sup>251</sup> For institutionalism, states are typically concerned with economic gain. Therefore, they create institutions to solve collective problems that result from interdependence among them. Accordingly, institutions make communication fluid and information more transparent, reducing the perception of mutual threats among states and thus reinforcing regional cohesion.<sup>252</sup> In institutionalism's understanding, institutions strengthen rather than weaken states, the latter using them to maximise the attainment of their objectives.<sup>253</sup> Also, Institutions can overcome uncertainty that undermines cooperation, for example when neither of trading partners wants to lower tariffs unless it can be sure the other will too.<sup>254</sup> Finally, institutions ensure compliance with agreements and can greatly increase efficiency by reducing transactions costs that bilateral and ad hoc negotiations could engender.<sup>255</sup>

#### *1.6.2.1. Brief historical account of institutionalism*

Institutionalism first appeared in the late 19<sup>th</sup> century and early 20<sup>th</sup> century as essentially a framework describing and mapping the formal institutions of the government.<sup>256</sup> This old institutionalism emphasised charting the formal legal and administrative arrangements of

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<sup>248</sup> Abbott, W. K. (2004-2005). "Toward a Richer Institutionalism for International Law and Policy". *Journal of International Law & International Relations* 1(1-2), p.13.

<sup>249</sup> Stein, A. A. (2008). "Neoliberal institutionalism". In: Reus – Smit C. and D. Snidal (Eds.). *The Oxford Handbook of International Relations*. New York. Oxford University Press, p.202

<sup>250</sup> Slaughter, A. M. (2011). "International Relations, Principal Theories". In: Wolfrum, R. (Ed.). *Max Planck Encyclopedia of Public International Law*. Oxford University Press.

<sup>251</sup> *Ibid.*

<sup>252</sup> López Vidal, L. (2008). *Op.Cit.*, p.41.

<sup>253</sup> *Ibid.*, p.40-41.

<sup>254</sup> Slaughter, A. M. (2011). *Ibid.*

<sup>255</sup> *Ibid.*

<sup>256</sup> Bell, S. (2002). "Institutionalism: Old and New". In: Summers, J. (Ed.). *Government, Politics, Power and Policy in Australia*. 7<sup>th</sup> ed. NSW Australia. Pearson Education Australia, p.3.

government and the public sector.<sup>257</sup> It is seen as mainly descriptive and not explanatory or theory building.

After the Second World War, the focus of institutionalism shifted from the formal institutions and arrangements of states to account for relationships within and beyond the institutions of government. This is also called behaviourism. With the proliferation of formal institutions for international cooperation and the rise of complex global issues since the 1980s, there has been a renewal of interests in institutions and the revival and expansion of institutionalism approaches.

#### 1.6.2.2. *Institutionalism's variants*

Basically, four strands of institutionalism have been established since and recognised as such as competing paradigms with different analytical approaches on two main features of international life: the *actors* whose decisions and conduct shape outcomes, and the *factors and processes* that cause, influence, or constitute decisions, actions and outcomes, from war, to cooperation, to compliance (or non – compliance) with legal rules.<sup>258</sup>

##### 1.6.2.2.1. *Rational choice*

Rational choice institutionalism borrows from economics and assumes that actors are rational, selfish, utility maximising individuals and that preferences are predetermined by the institutional context in which selfish motives are pursued.<sup>259</sup> Vivien Schmidt argues that rational choice institutionalism focuses on rational actors who pursue their preferences following a logic of calculation within given structures of incentives.<sup>260</sup> Rational choice institutionalism understands institutions as incentives - based structures in which interest is objective and material. It tends to see institutions as arrangements based on relatively “stable” choice equilibria.<sup>261</sup> One important argument for rational choice institutionalism is that even if individuals have coherent

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<sup>257</sup> Ibid.

<sup>258</sup> The two main features of international life as referred to above were transposed from their original application by Kenneth W. Abbott in his explanation of the complexity of approaches in International Relations Theory.

<sup>259</sup> Bell, S. (2002). *Op.Cit.*, p.5-6.

<sup>260</sup> Schmidt, A. V. (May 2008). *Bringing ideas and discourse back into the explanation of change in varieties of capitalism and welfare states*. Centre for Global Political Economy. University of Sussex, p.3.

<sup>261</sup> Bell, S. (2011). “Do we really need a New ‘Constructivist Institutionalism’ to Explain Institutional Change?”. *British Journal of Political Science* 41(4), p.886.



preferences, there may be a problem in aggregating their preferences into a collective one, thus institutions may allow some actors to set the political agenda which amendments are voted on first. Such a decision outcome has been termed ‘structured – induced’ equilibrium, as opposed to ‘preference – induced’ equilibrium.<sup>262</sup> Rational choice institutionalists argue that the relevant actors have a fixed set of preferences or tastes, behave instrumentally so as to maximise the attainment of the preferences, and do so in a highly strategic manner that presumes extensive calculation.<sup>263</sup> Hall and Taylor emphasise that for rational institutionalism, institutional arrangements guarantee collective actions against individual preferences and structure actors’ interactions with other actors by guiding their choices in order to reduce uncertainty about other actors’ behaviour and to allow ‘gains from exchange’.<sup>264</sup> They also explain rational choice’s approach to institutional creation as basically the result of voluntary agreement by the actors in order to realise institutional functional value often conceptualised in terms of gains for cooperation.<sup>265</sup>

#### 1.6.2.2.2. Sociological institutionalism

Sociological institutionalism is based on a different and totally opposed ontology to rational choice’s *calculus*, cultural approaches.<sup>266</sup> Sociological institutionalists define institutions broadly to include not just formal rules, procedures or norms, but the symbol systems, cognitive scripts, and moral templates that provide the ‘frames of meaning’ guiding human action.<sup>267</sup> Sociological institutionalism emphasises that institutions are all – defining cultural norms or socially constituted norms that frame action.<sup>268</sup> It is based on cultural norms understood as static structures and it focuses on social agents who act according to a logic of appropriateness within a given cultural context.<sup>269</sup> The logic of appropriateness is shared with constructivist explanations

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<sup>262</sup> Immergut, E. M. (2006). “Historical Institutionalism in Political Science and the Problem of Change”. In: Wimmer, A. and R. Kössler (Eds.). *Understanding Change*. Palgrave Macmillan. UK, p.241.

<sup>263</sup> Hall, A and C.R. Rosemary Taylor. (1996). *Political Science and the Three New Institutionalisms*. Public lecture. Max – Planck Institut Fur Gesellschaftsforschung, p.12.

<sup>264</sup> *Ibid.*, p.12.

<sup>265</sup> *Ibid.*, p.13.

<sup>266</sup> Hay, C. and D. Wincott (1998). “Structure, Agency and Historical Institutionalism”. *Political Studies* XLVI, p.951.

<sup>267</sup> Hall, A and C.R. Rosemary Taylor. (1996). *Op.Cit.*, p.14.

<sup>268</sup> *Ibid.*

<sup>269</sup> Schmidt, A. V. (May 2008). *Op.Cit.*, p.3.

that rely on it in opposition to a ‘logic of consequences’ that they supposedly avoid.<sup>270</sup> Sociological institutionalism points out that actors react not just to the hard wiring of their institutional environment but shape their interactions with institutions and with others through frames of reference, moral templates and normative orientations.<sup>271</sup>

#### 1.6.2.2.3. Historical institutionalism

The third approach, Historical Institutionalism, was influenced by political studies. It emphasises empirical analysis.<sup>272</sup> Historical Institutionalism underscores how institutions emerge from and are embedded in temporal processes through path dependence and divergence at critical historical junctures.<sup>273</sup> It focuses on historically developing structures that follow a logic of path – dependence within a given historical context that shapes action.<sup>274</sup> Historical institutionalism is premised on the idea that history is path – dependent in the sense that the characters of current institution depend not only on current conditions but also on the historical path to institutional development.<sup>275</sup> Historical institutionalism views institutional development not only in terms of path – dependence but also unintended consequences or unexplainable critical moments when structures ‘shift’. The essence of historical institutionalism approach to path – dependency involves critical juncture, that is to say crucial founding moments of institutional formation that send countries along broadly different developmental paths; and developmental pathways arguments that suggest that institutions continue to evolve in response to changing environmental conditions and ongoing political manoeuvring but in ways that are constrained by past trajectories.<sup>276</sup>

Historical institutionalism understands institutions as historically established patterns that constitute continuing and self – reinforcing structures. Historical institutionalism scholars see

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<sup>270</sup> Sterling – Folker, J. (2000). “Competing Paradigms or Birds of a Feather? Constructivism and Neoliberal Institutionalism Compared”. *International Studies Quarterly* 44, p.99.

<sup>271</sup> Bell, S. (2002). *Op.Cit.*, p.8.

<sup>272</sup> Steinmo, S. (2015). *Institutionalism*. International Encyclopedia of the Social & Behavioural Science. 2<sup>nd</sup> edition 12, p.183.

<sup>273</sup> Powell, W.W. and P. Bromley. “New Institutionalism in the Analysis of Complex Organisations”. *International Encyclopedia of the Social & Behavioural Science*. 2<sup>nd</sup> edition 16, p.764.

<sup>274</sup> Schimdt, V. (May 2008). *Op.Cit.*, p.3.

<sup>275</sup> Sterling – Folker, J. (2000). *Op.Cit.*, p.98.

<sup>276</sup> Thelen, K. (1999). “Historical Institutionalism in Comparative Politics”. *Annual Review of Political Science* 2, p.388.

institutions as intervening or structuring variables, in contrast to rational choice institutionalists' view of institutions as coordinating mechanism that generate or sustain equilibria.

While historical institutionalism has fully established itself among the three schools that constitute institutionalism, it is often depicted almost as lacking originality in the sense that it is located between rational choice approaches where institutions provide information that can reduce uncertainty for actors who make rational choices, and sociological approaches where institutions are considered cognitive templates that frame the choices of an individual.<sup>277</sup> Kathleen Thelen mentions rational choice institutionalists' criticism that historical institutionalists are engaged in something less than theory – building.<sup>278</sup> Another criticism points that historical institutionalism is an eclectic approach that is not necessarily distinct either in its theoretical framework or methodology from other types of new institutionalism.<sup>279</sup> Ellen Immergut argues that historical institutionalism refers to a rather loose collection of writings by authors that tend to mix elements of rationalistic and constructivist explanations, naming calculus and cultural approaches.<sup>280</sup> Ultimately, the most important criticism against historical institutionalism is its incapacity to explain institutional change because of path – dependency logic that considers institutional development as constrained by past trajectories. This criticism is not limited to historical institutionalism. Indeed, all the three forms of institutionalism explained above, namely rational choice, sociological and historical institutionalisms share the same blame for failing to explain institutional change because of their understanding of institutions as stable structures that frame actors' preferences and shape their behaviour. This constraining and self – reinforcing understanding of institutions is influenced by the old institutionalism of the late nineteen and early twentieth centuries for which change was not a pressing problem and that was instead concerned with normative and procedural aspects of formal institutions.<sup>281</sup> For the three new institutionalisms, institution matters because it shapes expectations. Thus, the three new institutionalisms emphasise institution to the detriment of

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<sup>277</sup> Steinmo, S. (2015). *Op.Cit.*, p.187.

<sup>278</sup> Thelen, K. (1999). *Op.Cit.*, p.372.

<sup>279</sup> Immergut, E. M. (2006). *Op.Cit.*, p.241-242

<sup>280</sup> *Ibid.*, p.242.

<sup>281</sup> *Ibid.*, p.237.

agency. This is exactly where the problem is. Scholars have generally referred to it as the structure – agency debate, or the rational – constructivist debate. The point is, if institution matters, what about change? Change is not unproblematic for the three new institutionalisms. Whereas they recognise institutional development, they attribute it to exogenous factors. The latter could be structural changes or socio – economic and political changes in the world order that lead institutions to either adopt new functions or to adjust their objectives. In this regard, the three new institutionalisms are said to be good at explaining institutional stasis and continuity rather than change.<sup>282</sup> If institutions are understood as formal and informal structures, there is a need to explain change not only in terms of material interests but also other foundational factors of institutions such as ideas and perceptions of actors about their institutional norms and values. A full account of institutional change needs to consider informal institutions too and how norms and values evolve over the time. This implies a turn to endogenous factors in explaining institutional change. A fourth strand of institutionalism, informed by constructivism and describing institutions as structures and constructs internal to active and sentient agents, has since emerged and established itself as a complementary approach to the three older institutionalisms.

#### 1.6.2.2.4. Constructivist – institutionalism

Constructivist-institutionalism was born from a concern for a full explanation of institutional change by emphasising agency rather than structure and by incorporating cognitive dynamics to existing material, interest – based explanations of institution and change. For constructivist-institutionalism it is important to understand individuals (actors)' perceptions of institutional norms and values. The core of constructivist – institutionalism's understanding is that actors create and recreate or maintain institutions in a dialectic process of interaction, as opposed to the shared understanding of the three older institutionalisms that conceive institutions as determining and constraining actors' preferences, interests and expectations.

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<sup>282</sup> Bell, S. (2011). *Op.Cit.*, p.885.

#### 1.6.2.2.4.1. The influence of constructivism

As the name indicates, constructivist – institutionalism lies at the nexus of the new institutionalism and constructivism. Constructivism is understood as an ontology, epistemology, methodology or an approach and, as such, it is distinct from rationalism and materialism.<sup>283</sup> It came out in opposition to and as a critique of realism.<sup>284</sup> Constructivists attribute the origin of constructivism essentially to postmodernism but also recognise other social theories such as post – structuralism and post - positivism as antecedents.<sup>285</sup> Constructivism focuses on the social construction of international politics that it considers as intersubjective or social reality as opposed to objective material reality.<sup>286</sup> Constructivists consider that what actors do in international relations, the interests they hold and the structures within which they operate are defined by social norms and ideas rather than objective or material conditions.<sup>287</sup> For constructivist theory, actors do not have objective identities or interests; identities, interests and many other attributes of ‘states’, ‘institutions’, ‘agencies’ and ‘non – state agencies’ – indeed most interesting features of the world – are ‘constructed’ in the form of shared subjective understandings.<sup>288</sup> Material attributes may be relevant but what those characteristics mean in practice is the product of ideas.<sup>289</sup> The analytical scope of constructivism is broad encompassing diverse phenomena such as intersubjective meanings, norms, rules, institutions, routinized practices, discourse, constitutive or deliberative processes, symbolic politics, imagined epistemic communities, communicative action, collective identity formation, and cultures of national security.<sup>290</sup> A key aspect of constructivism’s usefulness is that it illuminates the relationship between individuals and structures. Constructivists are interested in the dynamic construction of identities and preferences and the ways in which these attributes can be modified through social interaction.<sup>291</sup> They insist that actors’ identities and interests are not exogenously given but are constituted through interaction on the basis of shared norms such as international law, sovereignty and anarchy.<sup>292</sup>

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<sup>283</sup> Barkin, S. J. (2003). “Realist Constructivism”. *International Studies Review* 5(3), p.325.

<sup>284</sup> *Ibid*

<sup>285</sup> Sterling – Folker, J. (2000). *Op.Cit.*, p.98.

<sup>286</sup> Barkin, S. J. (2003). *Op.Cit.*, p.325.

<sup>287</sup> *Ibid*.

<sup>288</sup> Abbott, K. W. (2005). *Op.Cit.*, p.14.

The rise of constructivism in the 1980s challenging the rationalist account of norms has influenced the study of international organisations since the end of the Cold War and prompted interest in norms, ideas, learnings, and identity formation. Constructivism's strength lies in insisting that ideas and intersubjective meanings inform and shape the interests and choices of agents.<sup>293</sup> Although it is widely accepted among institutionalists that institutions matter because they structure strategic incentives and constraints, Sven Steinmo argues that it is also known that institutions do not determine outcomes because humans create and change institutions, also that humans have expectations and cognitive biases that affect their understanding of the institutions. This reflects the constructivist criticism of institutional theory's tendency to see agents as deeply embedded or constrained by institutional environments.<sup>294</sup> Therefore, Sven Steinmo argues that bringing agents back into institutional analysis brings ideas into the understanding of institutional change.<sup>295</sup> In this regard, Gary Herrigel attributes dimensions of social action and transformation to constructivism, as opposed to traditional conception of institutions as constraints for social action, for example, that actors confront considerable uncertainty, which in turn makes the meaning of rules ambiguous, thus making interpretation and creativity an inescapable dimension of social action and institutional change.<sup>296</sup> It is this interpretive role of agents and an analysis of the interplay between agency and institutional context that Stephen Bell calls the 'missing point' in the three older institutionalist accounts that favoured exogenous shocks or crises in the explanation of institutional change.<sup>297</sup> Constructivist institutionalism addresses the interplay between institutions and actors as mediated by ideas.<sup>298</sup>

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<sup>289</sup> *Ibid.*

<sup>290</sup> Christiansen, T. Jorgensen, K. E. and al. (1999). "The social construction of Europe". *Journal of European Public Policy* 6(4), p.530.

<sup>291</sup> Abbott, K. W. (2005). *Op.Cit.*, p.16.

<sup>292</sup> Slaughter, A-M. (1998). "International Law and International relations Theory: A New Generation of Interdisciplinary Scholarship". *The American Journal of International Law* 92(3), p.373.

<sup>293</sup> Bell, S. (2011). *Op.Cit.*, p.893.

<sup>294</sup> *Ibid.*, p.886.

<sup>295</sup> Steinmo, S. (2008). "What is Historical Institutionalism?". In: Della Porta, D. and M. Keating (Eds.). *Approaches in the Social Sciences*. Cambridge University Press. Cambridge, p.173.

<sup>296</sup> Herrigel, H. (2005). "Institutionalists and the limits of institutionalism: a constructivist critique of two edited volumes from Wolfgang Streeck and Kozo Yamamura". *Socio – Economic Review* 3, p.560.

<sup>297</sup> Bell, S. (2011). *Op.Cit.*, p.885.

<sup>298</sup> Snaith, H. (2013). *Op.Cit.*, p.15.

It interrogates the role of ideas and actors in generating endogenous change.<sup>299</sup> Constructivism institutionalism argues that the way in which actors understand their institutional backdrop is a process conditioned through the language they use..<sup>300</sup>

Constructivist institutionalists' approaches focus upon the affective role of ideas. They emphasise ideas as constitutive of institutions, even if shaped by them, rather than institutions constitutive of ideas.<sup>301</sup> Given the crucial space granted to ideas, constructivist institutionalism is variously described as ideational or discursive institutionalism.

#### 1.6.2.2.4.2. Discursive institutionalism

This formulation is spearheaded by Vivien Schmidt who claims the distinctiveness of discursive institutionalism for its focus not only on ideas as the substantive content of discourse, but also on discourse as the interactive process that serves to generate those ideas and communicate them to the public.<sup>302</sup> In this regard, Schmidt identifies two forms of discourse, coordinative discourse among policy actors engaged in creating, arguing, bargaining and reaching agreement on public policies in the public sphere, and communicative discourse between political actors and the public engaged in presenting, contesting, deliberating and legitimating such policies in the political sphere. Discursive institutionalism recognises a multitude forms of ideas such as narratives, myths, frames, collective memories, stories, scripts, scenarios and images.<sup>303</sup> Ideas, in discursive institutionalism, are located at three levels: policies, programmes and philosophies.<sup>304</sup> Discursive institutionalism identifies two types of ideas: cognitive that serve to justify policies and programmes in terms of their interest – based logic and necessity, and normative ideas that serve to legitimate policies and programmes in terms of their appropriateness and resonance with the more basic principles and values of public life.<sup>305</sup>

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<sup>299</sup> *Ibid.*, p.2.

<sup>300</sup> *Ibid.*, p.10.

<sup>301</sup> Moon, S. D. (2013). "‘Tissue on the Bones’: Towards the Development of a Post – structuralist Institutionalism". *Politics* 33(2), p.112.

<sup>302</sup> Schmidt, A. V. (2008). "Discursive Institutionalism: The explanatory Power of Ideas and Discourse". *Annual Review of Political Science* 11, p.304.

<sup>303</sup> *Ibid.*, p.309.

<sup>304</sup> *Ibid.*, p.306.

<sup>305</sup> Schmidt, V. (May 2008). *Op.Cit.*, p.4.

Discursive institutionalism's understanding of discourse includes ideas or text (what is said), context (where, when, how and why it was said), structure (what is said, or where and how) and agency (who said what to whom).<sup>306</sup> In other words, it allows consider not only 'what is said' but also 'who said what to whom, where and why' in the process of policy construction and communication.<sup>307</sup> Claude Radaelli and Vivien Schmidt argues that discourse is fundamental both in giving shape to new institutional structures, as a set of ideas about new rules, values and practices, and as a resource used by entrepreneurial actors to produce and legitimate those ideas.<sup>308</sup> Therefore, discourse assumes that it is necessary not only to explore its ideational dimension, that is the ideas and values that represent the cognitive and normative aspects of meaning creation –but also the interactive dimension – both the élite processes of policy formulation and the mass processes of communication and deliberation with informed and general publics.<sup>309</sup>

Discursive institutionalism explains institutional change and continuity in a logic of communication that combines agents' background ideational abilities and their foreground discursive abilities.<sup>310</sup> Discourse matters when it exerts a causal influence by serving to reconceptualise or redefine interests as opposed to merely reflecting them, reshape institutions and reframe culture.<sup>311</sup> In order to understand the transformative power of ideas and discourse and to show how they exert a causal influence and engender institutional change, Vivien Schmidt explains the criteria that justify why some ideas and discourses succeed and become dominant policies, programmes and philosophies in a given institutional setting. Examples include relevance to the issues at hand, adequacy, applicability, appropriateness, resonance, consistency and coherence across sectors.<sup>312</sup> The success of discourse is also associated with the institutional setting. Schmidt argues that discourse succeeds when speakers 'get it right' by addressing their

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<sup>306</sup> Schmidt, A. V. (January 2008). *Op.Cit.*, p.305.

<sup>307</sup> Schmidt, A. V. (May 2008). *Op.Cit.*, p.4.

<sup>308</sup> Radaelli, C. M. and V. Schmidt. (2005). "Policy Change and Discourse in Europe: Conceptual and Methodological Issues". In: Radaelli, C. M. and V. Schmidt. (Eds.). *Policy Change and Discourse in Europe*. Routledge. Oxon. England, p.10.

<sup>309</sup> *Ibid.*, p.11.

<sup>310</sup> Schmidt, A. V. (January 2008). *Op.Cit.*, p.314.

<sup>311</sup> Radaelli, C. M. and V. Schmidt. (2005). *Op.Cit.*, p.11

<sup>312</sup> Schmidt, A. V. (January 2008). *Op.Cit.*, p.312.



remarks to the 'right' audiences at the 'right' times in the 'right' ways.<sup>313</sup> Another factor for the success of discourse is that it must be both convincing in cognitive terms (justifiable) and persuasive in normative terms (appropriate and legitimate).<sup>314</sup>

Vivien Schmidt illustrates the transformative power of ideas and discourse with reference to various studies that explained, for example, why industrialised countries in Europe and America did or not adopt Keynesian economic ideas; or why EU member states adopted or rejected the Euro; or else understanding the economic philosophies that explain the state – led building of railroads in France compared to the private – led one in the United States.<sup>315</sup> She also recalls the effect of former British Prime Minister Thatcher's discourse on public acceptance of neo – liberal reform in the United Kingdom, and that of the former New Zealand Finance Minister Douglas on public rejection of the same reform.<sup>316</sup> Another relevant example of the transformative power of discourse in the context of the European integration and policy change refers to former British Prime Minister Blair's discourse, which unblocked a policy area that had seen little movement throughout the post - war period, when Blair argued that a new European security and defence initiative was necessary in light of changing United States' defence priorities with regard to NATO.<sup>317</sup> Similarly, the EU Commission officials' discourse is referred to for having produced a major shift in trade policy priorities from trade liberalisation to development, and in agricultural policy from production support schemes to sustainable development.<sup>318</sup>

## Conclusion

This chapter has considered a global heritage of regionalism as opposed to a certain Euro – centric explanation of it. However, it has recognised the European regionalism as an example of a successful pioneering and leading model that inspires and influences regional formations globally and not necessarily as constituting any universal model of regionalism to be emulated by other regions. The chapter has acknowledged the multidimensional character of the new regionalism,

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<sup>313</sup> Schmidt, A. V. (May 2008). *Op.Cit.*, p.5.

<sup>314</sup> Schmidt, A. V. (January 2008). *Op.Cit.*, p.313.

<sup>315</sup> *Ibid*

<sup>316</sup> *Ibid.*, p.312.

<sup>317</sup> Radaelli, C. M. and V. Schmidt. (2005). *Op.Cit.*, p.6.

<sup>318</sup> *Ibid.*

for instance that of Africa including the EAC, and its emphasis of bottom – up processes contrary to the top – down understanding of old regionalism. The chapter has taken into consideration non – material factors such as culture, identity, norms history and ideas for the explanation of not only regionalism but also regional organisations or institutions.

Furthermore, the chapter has explained both the static and determinist older institutionalism's understanding of institutions and the dynamic view of the newest institutionalism and its capacity to explain change. It has emphasised the explanatory power of constructivist institutionalism, precisely ideas and discourse.

## 2. INTERNATIONAL COOPERATION IN CRIMINAL MATTERS

### Introduction

This chapter discusses the development of international cooperation in criminal matters. It explains the origins of international cooperation in criminal matters from its two oldest mechanisms, extradition and the letter of request, and other mechanisms set up by the UN. The chapter also discusses principles that govern international cooperation in criminal matters.

### 2.1. Origins of international cooperation in criminal matters

The roots of international cooperation in criminal matters can be traced through two old practices: Extradition and the letter of request.

#### 2.1.1. Extradition

Extradition is a formal process by which a person is surrendered by one state to another based on a treaty, reciprocity, or comity, or on the basis of national legislation.<sup>319</sup> The process concerns the transfer to a state, of a person charged with an offence, for trial or a punishment for a person convicted of an offence. Extradition comes from the latin word “*extradere*” which means forceful return of a person to his sovereign.<sup>320</sup> It is the oldest mechanism of international cooperation in criminal matters that originated from ancient Egypt, China, Chaldea and Assyro-Babylonian.<sup>321</sup> Extradition is different from rendition, the surrendering of a person from one state to another or to an international tribunal acceding to the legal and administrative requirements of the surrendering state.<sup>322</sup> In the past, rendition was a gesture of friendship between two states resulting in the delivery of persons, the latter being considered as objects of sovereigns.

The first recorded extradition treaty was signed in 1280 B.C. by the Pharaoh of Egypt Ramses II.<sup>323</sup>

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<sup>319</sup> Bassiouni M. C. (2014). *International extradition: United States Law and Practice*. Sixth Edition, Oxford, The University Press, USA, p.2.

<sup>320</sup> *Ibid*, p.4.

<sup>321</sup> Prost, K. (2007). “Breaking down the barriers: International cooperation in combating transnational crime”, *Information Exchange Network for Mutual Assistance in Criminal Matters and Extradition*. Accessed at [http://www.oas.org/juridico/mla/en/can/en\\_can\\_prost.en.html](http://www.oas.org/juridico/mla/en/can/en_can_prost.en.html), accessed on 15 March 2014.

Also, Blakesley, C., L. (1981). “The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History”, *Boston College International and Comparative Law Review* IV (1), p.42.

<sup>322</sup> Bassiouni, M., C. *Op. cit.*, p.2.

<sup>323</sup> Prost, K. *Op. cit.*

It was a peace treaty with a Hittite king, Hattusili III, for the return of persons sought by each sovereign who had taken refuge in the other's territory.<sup>324</sup> Extradition applies only in criminal proceedings. It is a form of international cooperation where a state gives assistance to another state for the arrest of a person charged with or convicted of an offense.

Extradition intends to avoid the problem that criminals are able to escape justice by crossing national borders. It supposes that states have an interest in cooperating and facilitating the punishment of criminal conduct, especially among neighbouring states. Normally extradition is subject to an existing treaty between states. In this regard, there could be a bilateral or a multilateral extradition treaty. Bilateral treaties did not begin to emerge until the 1800s, particularly in common law jurisdictions.<sup>325</sup> While a treaty is a requirement for extradition in common law legal systems, this is not necessarily the case in civil law legal systems though the latter have also now made it a requirement. A treaty is a requirement and sole basis for extradition in most countries, however. The rise of new nations and the development of regional organizations engender the need for more extradition treaties.

Extradition has long been used by States to protect their sovereignty. Until the early 1800s, extradition was used for the return of fugitives sought for political or religious offenses.<sup>326</sup> In the 1900s extradition changed its focus to common serious offenses.<sup>327</sup> Political offences became a ground for refusal in extradition.

Extradition has experienced a new development in the last 50 years with the advancement of technology, globalization and subsequently the development of transport links, the rise of criminality and the emergence of a new international legal order.<sup>328</sup> Thus, extradition now operates not only between states but also between states and international courts.

In the paragraphs below, I will look at the evolution of extradition in the United Kingdom and in

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<sup>324</sup> Shearer, I., A. (1971). *Extradition in International Law*. The University Press, Manchester, P. 5.

<sup>325</sup> Joutsen, M. (2005). "International Instruments on Cooperation in Responding to Transnational Crime". In: Reichel, P. (Ed) *Handbook of Transnational Crime and Justice*. Sage Publications. London, p.259.

<sup>326</sup> Prost, K., *Op. cit.*

<sup>327</sup> *Ibid*

<sup>328</sup> *Ibid*

France as two countries representing two different legal systems in Europe.

#### *2.1.1.1. Extradition in the United Kingdom*

The first modern extradition treaty in the United Kingdom dates back in 1842.<sup>329</sup> It was a treaty between Great Britain and the United States of America for the surrender of alleged offenders in cases of murder, assault with intent to commit murder, piracy, arson, robbery and forgery.<sup>330</sup> The treaty was known as Webster-Ashburton treaty and was given effect by statute 6 & 7 Vict. C.76 and enacted in 1843.<sup>331</sup> A similar treaty was made with France in 1843, for the offenses of murder, attempted murder, forgery and fraudulent bankruptcy.<sup>332</sup> The two acts were limited to persons accused of the specified offences.<sup>333</sup> They did not include persons tried and convicted.<sup>334</sup> Another treaty between the United Kingdom and Denmark concluded in 1862 applied to both accused and convicted persons.

Between 1848 and 1868, the United Kingdom made 48 extradition requests to France and 36 to the United States.<sup>335</sup> In return, France and the United States respectively made 96 and 53 extradition requests to the United Kingdom.<sup>336</sup> Until then, Great Britain had concluded and given effect to extradition treaties with only three foreign states: The United States, France and Denmark.<sup>337</sup> As the United States and France complained about the limited number of offences enumerated in the extradition treaties with England, the latter planned the adoption of a permanent and uniform policy on extradition, that lead to a more comprehensive statute, the extradition Act 1870.<sup>338</sup>

The view of the United Kingdom in that period was that the differences between the common law and the civil law jurisdictions of Europe made it impossible for the United Kingdom to engage

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<sup>329</sup> Baker, S., Perry D. and A. Doobay (2011). A review of the United Kingdom's extradition arrangements, p.26. Accessed at <https://www.gov.uk/government/uploads/.../extradition-review.pdf>, on 16 March 2014.

<sup>330</sup> *Ibid*

<sup>331</sup> *Ibid*

<sup>332</sup> *Ibid*

<sup>333</sup> *Ibid*

<sup>334</sup> *Ibid*

<sup>335</sup> *Ibid*, p.28.

<sup>336</sup> *Ibid*

<sup>337</sup> *Ibid*

<sup>338</sup> *Ibid*, p.27-28

in civil procedure treaties and conventions.<sup>339</sup> The same objections were expressed by the United Kingdom towards the 1959 European Convention on MLA in Criminal Matters and recently the 1985 Schengen Agreement.<sup>340</sup>

The Extradition Act 1870, the first modern extradition statute, considered both accusation cases and convictions cases.<sup>341</sup> Under the 1870 Act, extradition continued to be based on bilateral treaties which defined conditions governing the surrender to and from Great Britain. The Act was made to apply to any future bilateral treaty.<sup>342</sup> Therefore, it was no longer necessary to enact a statute for each bilateral extradition treaty, as long as an Order in Council applying the Act has been made after an extradition treaty was concluded.<sup>343</sup>

The Extradition Act 1870 as well as the Fugitive Act 1967 remained in force until they were repealed by the Extradition Act 1989.<sup>344</sup> The Extradition Act 1989 aimed at providing a uniform procedure for extradition to foreign states and Commonwealth countries and to facilitate adherence by the United Kingdom to the European Convention on Extradition. It was a consolidated statute regime combining the Extradition Act 1870 to 1935 and the 1967 Act.<sup>345</sup> The Extradition Act 1989 operated only a few years. Its procedure appeared to be too complex, technical and had a tendency to lead to delay. The government of the United Kingdom initiated a review of the law in 2001, which led to the enactment of the Extradition Act 2003.<sup>346</sup> The 2003 Act undertook a reform of extradition law in the UK primarily to implement the EAW.<sup>347</sup> It sets two extradition procedures. Part 1 of the Act (Section 1-68) deals with extradition to 'Category 1 territories', EU member states who are part to the EAW and it gives effect to the FD EAW. Part 2

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<sup>339</sup> Sutherlands, P.F. (1982). "The use of the letter rogatory for the purpose of obtaining evidence for proceedings in England and abroad." *International and Comparative Law Quarterly* 31(4), p.787.

<sup>340</sup> Vogler R. "Report on England." In: Ruggeri S. (Ed). (2013). *Transnational Inquiries and the Protection of Fundamental Rights in Criminal proceedings*. Messina, Springer, p.389.

<sup>341</sup> Baker, S., Perry D. and A. Doobay (2011). *Op.Cit.*, p.32. Also, Castel, J.G. and M. Edwardh (1975). "Political offences: Extradition and deportation- Recent Canadian developments". *Osgoode Hall Law Journal* 13(1), p.90.

<sup>342</sup> Baker, S., Perry D. and A. Doobay (2011). *Op.Cit.*, p.32.

<sup>343</sup> *Ibid.*

<sup>344</sup> *Ibid*, p.30.

<sup>345</sup> *Ibid*, p.56.

<sup>346</sup> *Ibid*, p.69

<sup>347</sup> Mackarel, M. (). 'Surrendering' the Fugitive- The European Arrest Warrant and the United Kingdom. *The Journal of Criminal Law* 71(4), p.368

deals with extradition procedures with other countries. The extradition Act 2003 prompted much debate on Category 2 extraditions, particularly the agreement with the US that there is no requirement for the US to provide *prima facie* evidence when requesting extradition of US residents although that continued to be necessary when the UK sought the extradition of those in the US.<sup>348</sup>

The extradition Act 2003 aims to improve the fight against cross-border crime and bring to justice offenders who flee to other countries.<sup>349</sup> The Act is criticised for not providing adequate protection of rights of persons alleged of suspects and victims of crimes.<sup>350</sup> The report of the Joint Committee on Human Rights in the House of Lords and the House of Commons describes the protection of rights in the Extradition Act 2003 as “significantly below the standard which a United Kingdom citizen should expect”.<sup>351</sup> The report highlights the lack of a specific and detailed safeguard for the rights of persons.<sup>352</sup> It also deplores the lack of a requirement for *prima facie* as a way to prevent speculative charges in extradition cases.<sup>353</sup> The report also observes that extradition process would be more effective only if the Act provides for legal representation in both the requested and the requesting country.<sup>354</sup>

The report makes criticisms about lack of effective protection of in the European Arrest Warrant as well.<sup>355</sup> It observes a lack of proportionality principle in the Framework of the European Arrest Warrant, which Causes extradition requests for minor offences.<sup>356</sup> For example a Poland extradition submission on a charge of “unintentional receiving of stolen property” involving the acquisition of 100 *Zloty* (24 euros), which was rejected by the Divisional Court though on the basis

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<sup>348</sup> Padfield, N. (2007). “The European Arrest Warrant: Between Trust, Democracy and the Rule of Law. The Implementation of the European Arrest Warrant in England and Wales”. *European Constitutional Law Review* 3(2), p.255.

<sup>349</sup> *The Human Rights Implications of the United Kingdom Extradition Policy*. Report of the Joint Committee on Human Rights. The House of Lords and the House of Commons. (2011). P.9.

<sup>350</sup> Ibid

<sup>351</sup> Ibid

<sup>352</sup> Ibid., p.4

<sup>353</sup> Ibid

<sup>354</sup> Ibid

<sup>355</sup> Ibid.

<sup>356</sup> Ibid

of double criminality and not proportionality.<sup>357</sup>

#### 2.1.1.2. Extradition in France

On 4th March 1376, the French King Charles the VI and Amadeus the VI, The Count of Savoy, signed an extradition treaty which is seen as the first modern example of which there is a record.<sup>358</sup> The treaty related to the exchange of criminals. However, another treaty signed in 1736 between France and Holland for the extradition of individuals charged with common crimes is referred to by Blakesley as much modern.<sup>359</sup> France played a significant role in the development of extradition in the eighteenth and nineteenth centuries, concluding bilateral extradition treaties with almost all her neighbours. Blakesley describes the treaty between France and Wurtemberg in 1759 as a prototype extradition treaty of the modern era. Extradition in France was politically motivated until a law in 1927 established a procedure of extradition of alleged criminals to and from France. The 1927 French law was repealed on 9 March 2004 by the law adapting the justice system to crime development. While this 2004 law regulates cooperation in criminal matters, it was triggered by the obligation to implement the EAW too, which deadline was 31 December 2003. The law changed the political nature of extradition to a judicial control-oriented procedure by empowering the French judiciary to oversee the surrender of a requested person.

#### 2.1.2. Letter of request

A letter of request is a formal request from a court to a foreign court for some type of judicial assistance.<sup>360</sup> It is also known in the United States of America as letter rogatory. Concretely, in a letter of request a country requests, through its court, another country through its own court and the latter's control, to assist the administration of justice in the former country.<sup>361</sup> Rolle reports a letter of request ordered to issue to the court of Holland in an action for trespass in

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<sup>357</sup> Vogler R. (2013). *Op.Cit.*, p.395.

<sup>358</sup> Garner, J.M. (1922). Book review. *Introduction à l'Etude du droit Pénal International*, By H. Donnedieu de Vabres. *The American Journal of International Law* 16(3), p. 493-494.

<sup>359</sup> Blakesley, C., L. (1981). *Op.Cit.*, p.50.

<sup>360</sup> Springer, J. P. (2001). "Obtaining Foreign Assistance to Prosecute Money Laundering Cases: A US Perspective". *Journal of Financial Crime* 9(2), p.158.

<sup>361</sup> Sutherland, P. F. (October 1982). "The use of the letter of request (or letter rogatory) for the purpose of obtaining evidence for proceedings in England and abroad". *International and Comparative Law Quarterly* 31(4), p. 784.



1295.<sup>362</sup> The enactment in 1831 of the Statute 1 William IV, also known as Evidence on Commission Act, allowed the courts of common law to take the evidence of a witness beyond the British Dominions.<sup>363</sup> In 1833, the Order XXXVII, rule 6A of the Rules of the Supreme Court established a formal procedure by which the evidence of a witness abroad could be taken by letter of request.<sup>364</sup>

The letter of request aims at seeking judicial assistance in the form of taking the testimony of a witness or securing tangible evidence such as bank records and conducting investigations. The legislation of most countries allows parties to the proceedings to apply for the evidence that is in a foreign country. Conversely, the legislation of the same countries allows foreign requests for evidence that lies within their jurisdiction. A state that gives legal assistance to another state would expect a reciprocal assistance in similar situations. The letter of request is used to obtain testimony and evidence in a foreign jurisdiction.<sup>365</sup> Traditionally, letters of request were submitted through diplomatic channels.<sup>366</sup> Thus, compliance with a letter of request from a foreign requesting country was generally considered a matter of courtesy, unless the state of the requesting court and that of the requested court have enacted a treaty that made it mandatory. The practice of letter of request was based on the principle of comity.<sup>367</sup> Despite the diplomatic character of letter of request, a treaty is not a requirement for it to be processed. The law of many states provides for the processing of letters of request. The letter of request is mostly used in civil matters.

Letters rogatory were very slow and they were not always effective in helping to obtain evidence in a reasonable amount of time. So, states developed a new concept of cooperation regarding investigation, namely MLA.<sup>368</sup> In the 1960s, many states in Europe and America concluded

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<sup>362</sup> Cited in *Ibid*, p.786.

<sup>363</sup> *Ibid*.

<sup>364</sup> *Ibid*.

<sup>365</sup> Leroy, H. (March 1953). "International judicial assistance: Procedural chaos and a program for reform". *The Yale Law Journal* 62(4), p. 529. Also, Sutherland, P. F., *Op. cit.*, p.785.

<sup>366</sup> Joutsen, M. (2005). *Op.Cit.*, p.266.

<sup>367</sup> *Reciprocity for Letters Rogatory under the Judicial Code*. (Jun.1949). Notes. *The Yale Law Journal* 58(7), p.1194. Also, Conway, A.J., "In re request for judicial assistance from the Federative Republic of Brazil: A blow to international judicial assistance". *Catholic University Law Review* 41(545), p.548. Year?

<sup>368</sup> UNODC (2009). *Manual on International Cooperation in Criminal Matters related to Terrorism*, p.79.

bilateral treaties on MLA. Also, regional organizations like the Council of Europe, the Organization of American States and the League of Arab States promoted regional multilateral treaties based on the same concept <sup>369</sup>

### 2.1.3. International cooperation at the UN

International cooperation in criminal matters at the UN dates back to the 1970s with the onset of the fight against terrorism. The UN developed strong international cooperation mechanisms among States, in particular with extradition, MLA, the transfer of criminal proceedings, the transfer of convicted persons, recognition of decisions of foreign criminal jurisdictions, the freezing or seizure of assets, and cooperation between law enforcement agencies.

Legal assistance in criminal proceedings on terrorism first appeared in the Convention for the Suppression of Unlawful Seizure of Aircraft of 1970. It also appears in all subsequent criminal conventions, except in the Convention on the Making of Plastic Explosives for the Purpose of detection, of 1991. The conventions on air security<sup>370</sup> make an obligation to Contracting States where suspects of unlawful seizure of aircraft are to immediately investigate about the facts and report findings to the State of registration of the aircraft and the State of which the suspects are nationals. They all provide for the extradition of suspects. The Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971 further requires Contracting States to disclose any relevant information on offences they believe will be committed. Subsequently, all conventions since then require States to adopt measures for the prevention of offences committed against other States Parties. For example, article 5 of the Convention against Corruption; art 18 of the International Convention for the Suppression of the Financing of Terrorism; article 11 of the Convention on the Elimination of All Forms of Discrimination against

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<sup>369</sup> Example, the European Convention on Mutual Assistance in Criminal Matters on 6 December 1959 and First Addition Protocol on 15 October 1975 as well as the Second Additional Protocol on 17 March 1978; The Inter – American Convention on Mutual Assistance in Criminal Matters of 23 May 1992; The Arab League Agreement on Extradition and Judicial Cooperation of 1983 (Also referred to as the Riyadh Agreement and including the 1951 Arab League Agreement on Extradition and the 1951 Arab League Agreement on judicial cooperation).

<sup>370</sup> The Convention on offences and Certain Other Acts Committed on Board Aircraft (1963, entered into force on 4 December 1969), the Convention for the Suppression of Unlawful Seizure of Aircraft (1970, entered into force on 14 October 1971) and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971, entered into force on 26 January 1973).

Women; and articles 2 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973), extended the obligation to disclose information and provided for the duty to exchange information and to coordinate administrative measures and preventive measures. The Convention against the Taking of Hostage of 1979, too, requires the States Parties to cooperate in the prevention of the offences by taking practical prevention measures and exchanging information and coordinating administrative and preventive measures.<sup>371</sup> The obligation to cooperate also appears in the Convention on the Physical Protection of Nuclear Material of 1979, in relation with systems of physical protection of nuclear material in international transport.<sup>372</sup>

The International Convention for the Suppression of Terrorist Bombings of 1997 calls upon States Parties to provide one another the greatest measure of assistance in investigation or criminal or extradition proceedings, including assistance in obtaining evidence at their disposal.<sup>373</sup> The same call is made in the UN Convention for the Suppression of the Financing of Terrorism (1999) in article 12. The latter further encourages States Parties to establish mechanisms to share information or evidence needed to establish criminal, civil or administrative liability.

In the aftermath of 9/11 terrorist attacks in New York, Washington DC and Pennsylvania in the United States of America, the UN Security Council adopted Resolution 1373 (2001) at its meeting on 28 September 2001, which constitutes a general basis for international cooperation in matters of terrorism.<sup>374</sup> It makes it an obligation on all States to afford one another the greatest measure of assistance in criminal investigation or criminal proceedings of financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the

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<sup>371</sup> Article 4 Convention against the Taking of Hostage of 1979.

<sup>372</sup> Article 5 Convention on the Physical Protection of Nuclear Material of 1979.

<sup>373</sup> Article 10 International Convention for the Suppression of Terrorist Bombings of 1997.

<sup>374</sup> UNODC (2009). *Op.Cit.*, p.16.

proceedings.<sup>375</sup> The Resolution emphasizes on international cooperation. It calls for exchange of information and increased cooperation through bilateral and multilateral conventions.

The increase of international narcotics trafficking in the 1980s made governments envisage mechanisms to improve international cooperation in the investigation and the prosecution of international narcotics trafficking.<sup>376</sup> As a result, the General Assembly of the UN adopted resolution 39/141 on a draft convention against Traffic in Narcotic Drugs and Psychotropic Substances and Related Activities, which lead later to the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances adopted on 19 December 1988. The UN Convention urges signatory parties to provide judicial assistance and to engage in extradition, MLA, transfer of proceedings and other forms of cooperation and training. It encourages them to conclude bilateral and multilateral treaties, agreements or arrangements to enhance the effectiveness of international cooperation.<sup>377</sup> The Convention prohibits the refusal of MLA on the grounds of bank secrecy and set conditions under which refusal of MLA may be considered, such as prejudice to the sovereignty of the requested party.<sup>378</sup> The Convention should have clarified conditions under which the sovereignty motive in response to a request for legal assistance would be considered. Sovereignty is a broad theory that, if not clarified, can be used as an excuse to violate justice, thus contributing to weaken international law also referred to as soft law.

The UN also adopted the Model Treaty on Extradition in the General Assembly Resolution No 45/116 of 14 December 1990 and the Model Treaty on Mutual Assistance in Criminal Matters in the General Assembly Resolution n0 45/117 of 14 December 1990. These two instruments are

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<sup>375</sup> Security Council, Resolution 1373 28/09/2001, 2(f). Accessed at <http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20%282001%29.pdf>, on 20 May 2014.

<sup>376</sup> Zagaris, B. (1989-1990). "Development in International Judicial Assistance and Related Matters". *Denver Journal of International Law and Policy* 18(3), p.339.

Also, Opertti, D. (May 1992). "Juridical Mutual Cooperation in Criminal Matters. The latest trends in the Inter – American System and the bilateral treaties between the United States and Latin". *American Countries, Netherlands International Law Review* 39(1), p.89.

<sup>377</sup> Article 5 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 19 December 1988.

<sup>378</sup> Article 7(10) b Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 19 December 1988.

the major basis for national legislation of states.<sup>379</sup>

The growing phenomenon of transnational organized crime in the 1990's made the UN adopt the Convention against Transnational Organized Crime on 15 November 2000. The Convention fosters close international cooperation among State Parties to fight against transnational organized crime. It includes detailed provisions on mutual assistance. It also includes provisions for freezing of assets, the use of video – conferences and the transmission of information without a request.

The UN also adopted the Convention against Corruption, in 2003, which provides State Parties with specific forms of MLA in gathering and transferring evidence for use in court, extradition of offenders, tracing, freezing, seizure and confiscation of the proceeds of corruption. One innovation in the Convention is that it requests State Parties to allow legal assistance in the absence of dual criminality<sup>380</sup> when such assistance does not involve coercive measures.<sup>381</sup>

The UN Conventions on organized crime and corruption make mandatory the designation of central authority for all incoming and outgoing legal assistance and extradition request. This mechanism may help States Parties to better coordinate requests for assistance and to respond expeditiously.<sup>382</sup>

## 2.2. Principles of international cooperation in criminal matters

International cooperation in criminal matters aims at supporting foreign judicial proceedings. It falls under the scope of International law and international cooperation. In view of sovereignty, the requested state is normally not under any obligation to satisfy a request for assistance. States generally act under the principle of comity. To avoid uncertainty and any complications that may result, most states engage in bilateral treaties or agreements to smooth cooperation. Treaties create obligation between states to satisfy requests for legal assistance. International cooperation treaties define obligations between states involved and specify requirements, limits

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<sup>379</sup> Farooq, A. (2001). 86. Farooq, A. (2001). International Cooperation to combat organized crime. UNAFEI, Resource material series no 57, p.170.

<sup>380</sup> This theory is explained in the next section.

<sup>381</sup> Article 46 (9 – 29) UN Convention against Corruption.

<sup>382</sup> Dandurand, Y., G. Colombo *et. al.* (2007). "Measures and mechanisms to strengthen international cooperation among prosecutions services", *Crime, Law and Social Change* 47, p.268.

and types of assistance that they may request. They apply some legal principles that states in practice have been putting forward as conditions for providing legal assistance.

### 2.2.1. Reciprocity

Reciprocity is an international principle of cooperation among states. It requires states to return in kind favours, benefits or penalties granted to its citizens or legal entities by other states. Essentially reciprocity means that the requesting state will provide the requested state the same assistance in the future. Whereas the principle is prevalent in civil law tradition states where it is viewed as a binding covenant, it is not an obligatory principle in common law tradition states.<sup>383</sup>

The principle of reciprocity is usually incorporated into treaties, memoranda of understanding and domestic law. For example, Japan provides MLA and extradition on the basis of its domestic laws that require a guarantee from the requesting country that it would honour a request of the same kind made by Japan.<sup>384</sup> In a treaty, reciprocity may concern an aspect of the process. It refers to an idea of parallelism between the processes of the requesting state and the requested state.<sup>385</sup> The UN Convention against Transnational Organized Crime mentions the principle of reciprocity and requests States Parties to afford one another the widest measure of MLA in investigations, prosecutions and judicial proceedings of the offences covered by the Convention.

The principle of reciprocity can be very useful in the absence of any treaty between states where it may consist of a promise that one state will do the same to another state in the future should the need arise. Ideally, the requesting state and the requested state should agree on the process of assistance, otherwise the requested state may consider an aspect of the requesting state's process not compatible with its process and thus refuse the assistance sought for lack of reciprocity.

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<sup>383</sup> UNODC (2012). *Manual on Mutual Legal Assistance and Extradition*, p.23.

<sup>384</sup> Article 3(ii) Extradition Act, and article 4(ii) International Assistance in Investigation and Other related Matters Act. Accessed at <http://www.moj.go.jp/ENGLISH/ccr/2stMeeting/ic-01.html>, on 15 May 2014.

<sup>385</sup> Farooq A. *op. cit.*, p168.

### 2.2.2. Dual criminality

Historically, the principle of dual criminality developed as a consequence of reciprocity.<sup>386</sup> It is associated with the legal principle *nullum crimen, nulla poena sine lege*. Dual criminality means that a criminal conduct for which extradition or legal assistance is requested is an offense not only under the law of the requesting state but also under the law of the requested state.<sup>387</sup> Consequently, the requested state is not under any obligation to grant extradition or any legal assistance for a conduct which does not constitute an offence, or which is not punishable under its law. Dual criminality has been the procedural foundation of most MLA treaties.<sup>388</sup> It can impede cooperation in the investigation and prosecution of offences. While some states require dual criminality for all requests of assistance, some do for compulsory measures only, some others keep discretionary power to refuse assistance on the ground of lack of dual criminality, and some others do not make any requirement for requests of assistance or any discretionary power to refuse the assistance sought.

As noted previously, Article 18(9) UN Convention against Transnational Organized Crime allows a state to decline MLA in the absence of dual criminality but gives it the option to waive the requirements of dual criminality and provide the assistance irrespective of whether the conduct would constitute an offence under the law of the requested state. A significant development has been made by the UN Convention against Corruption so as to encourage States Parties to grant legal assistance in the absence of dual criminality when such assistance does not involve coercive measures.<sup>389</sup> The Convention calls upon States Parties to consider the dual criminality requirement fulfilled whenever it is necessary for international cooperation, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties.<sup>390</sup>

The principle of dual criminality may lead to serious difficulties mainly because offences may not

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<sup>386</sup> Lagony, O. and W. Schomburg (1994). "International Cooperation in Criminal Matters and the Rights of the Individual from a Germany Perspective". *European Journal of Crime, Criminal Law and Criminal Justice* (4), p.387.

<sup>387</sup> Joutsen, M. (2005). *Op.Cit.*, p.260.

<sup>388</sup> Dandurand, Y., G. Colombo et. al. *op. cit.*, p.268.

<sup>389</sup> Article 46, (9) (b), UN Convention against corruption.

<sup>390</sup> Joutsen, M. (2005). *Op.Cit.*, p. 260. See example, Article 43 (2), UN Convention against corruption.

be the same in the law of the states or criminal conducts for which assistance is sought may not correspond to the offences covered by a treaty. For this purpose, the UN Convention against Corruption states that it is not necessary for the laws of the requested state and the requesting state to place the offence within the same category or denominate the offence by the same terminology.<sup>391</sup>

### 2.2.3. Specialty

Specialty is another principle in international cooperation, in virtue of which the requesting state may not prosecute or punish the defendant for any crime other than those included in the decision granting legal assistance,<sup>392</sup> or the request for extradition. Although this principle does not prevent legal assistance, it limits the right to prosecute. It assumes that the requesting state shall prosecute or punish the offender only for the offense for which the requested state granted legal assistance. The principle protects witnesses or offenders against unexpected prosecution. It is violated when the requesting state charges or prosecutes the defendant for an offense that was not consented for by the requested state.

The specialty principle emerged from the French concept of *spécialité* or particularity.<sup>393</sup> It did not become a feature of extradition treaties until 1850 when its modern form appeared for the first time in an extradition treaty between France and Saxony.<sup>394</sup> As the practice of extradition shifted from the return of political enemies to obtaining jurisdiction over criminals, the rule of specialty developed in order to ensure that extraditions were not sham political renditions,<sup>395</sup> also in an effort to maintain cooperation and good faith between the parties of extradition treaties.<sup>396</sup> Specialty serves as a safeguard against not only prosecutions for political offences but violations of all other substantive rules of extradition law, such as dual criminality, the protection

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<sup>391</sup> Article 43 (2), UN Convention against corruption.

<sup>392</sup> Farooq A. *op. cit.*, p.169.

<sup>393</sup> Forstein, C. (2015). "Challenging Extradition: The Doctrine of Specialty in Customary International Law". *Columbia Journal of Transnational Law* 53(2), p.368.

<sup>394</sup> Summers, M. A. (2010). "Rereading Rauscher: Is it time for the United States to abandon the rule of specialty?". *Duquesne Law Review* 48(1), p.12.

<sup>395</sup> *Ibid.*, p.4.

<sup>396</sup> Cafarelli, A. (2010). "Extradition law- Criminal defendants extradited outside of treaties lack standing to assert rule of specialty- United States v. Valencia-Trujillo, 573 f.3d 1171 (11th cir. 2009)". *Suffolk Transnational Law Review* 33(2), p.377.



against double jeopardy, or death penalty exception. The protection of the rights of the person subject to extradition is an important function of the rule of specialty. The rule requires, in respect of all crimes for which an extradited person might be tried, compliance with all guarantees of the extradition process. It is motivated by the protection of state sovereignty.<sup>397</sup> The rationale underlying the rule is that extradition is a contractual arrangement between the requested and the requesting sovereign states.<sup>398</sup>

While the status of specialty in customary international law is undefined<sup>399</sup>, it is included in various international instruments, such as the Rome Statute of the ICC (Article 101), the European Convention on extradition of 1957 (Article 14), and the Inter – American Convention on extradition of 1981 (Article 13). The UN Model Treaty on Extradition too includes a suggested provision on specialty (Article 14).

#### 2.2.4. Exclusion of political offence

Political offences exception is a potential ground for refusal of extradition and MLA.<sup>400</sup> In the past, persons who acted against the state and were pursued and punished sought for asylum. Asylum was then an exception to extradition, and it was usually granted only if it benefited the requested state. As the world order developed with time, asylum was very limited, and extradition became the norm. With the political uprising mentality and change of attitude towards political offence after the eighteenth century, European democracies opposed the extradition of political offenders and refugees. As a matter of principle, the states denied extradition if the offence for which it is requested is regarded by the requested state as an offence of a political nature. This principle originated from the political philosophy of the social contract theorists and the French Revolution and it was first formalized by a statute in 1833 in Belgium.<sup>401</sup> The French incorporated into their Constitution of 1793 a provision guaranteeing asylum to all those exiled for the

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<sup>397</sup> Griffith, G. and C. Harris (2005). "Recent Developments in the Law of Extradition". *Melbourne Journal of International Law* 6(1), p.18.

<sup>398</sup> *Ibid.*, p.18-19.

<sup>399</sup> Forstein, C. (2015). *Op.Cit.*, p.367.

<sup>400</sup> See, Article 3(a) UN 1990 Model Treaty on Extradition and article 4.1.(b) UN 1990 Model Treaty on Mutual Legal Assistance.

<sup>401</sup> Castel, J.G. and M. Edwards (1975). "Political offences: Extradition and Deportation- Recent Canadian Developments". *Osgoode Hall Law Journal* 13(1), p.89.

contribution in the fight for democratic government. This was first time a difference was made between political and common offences.<sup>402</sup>

The principle was reinforced in the last century with the growing concern and expansion of human rights.<sup>403</sup> One problem with political offence exception globally is that the term “political offence” is not defined in many countries. There is no international consensus to what constitutes a political offence. Its appreciation varies from the motive, the effect and the purpose of the offence, the identity of the victim, democracy, human rights and the immediate circumstances of political conflicts in a country. Some political offences are perpetrated directly against the government, such as treason and espionage. They are also named pure political offences. Some others are violent crimes in connection with political uprisings, also named relative political offences.

It was not until 1870 that the United Kingdom first formally recognized the political offence in the Extradition Act.<sup>404</sup> Thus, all extradition treaties since then contained the exception. The Extradition Act 1870 stated that “a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character...”.<sup>405</sup> It did not define such an offense and therefore different interpretations were adopted by courts. Mr Justice Stephen, for example, said that a political offence was one committed during a political disturbance, and was incidental to and formed a part of such a disturbance.<sup>406</sup> All subsequent treaties and legislations in the United Kingdom, for example the Fugitive Offenders Act 1967 used the same wording “offence of a political character”. There is no statutory or generally accepted definition of relative political offence in the United Kingdom.<sup>407</sup> The English system uses an

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<sup>402</sup> *Ibid*

<sup>403</sup> UNAFEI (2000). *Refusal of mutual legal assistance or extradition*. 114<sup>th</sup> International Seminar, International Cooperation to Combat Transnational Organized Crime- With Special Emphasis on Mutual Legal Assistance and extradition. Resource material series 57, p.189.

<sup>404</sup> See, Sutherland, P. D. (1984). “The development of international law of extradition”. *Saint Louis University Law Journal* 28(1), p.34.

<sup>405</sup> Article 3 Extradition Act 1870.

<sup>406</sup> Cantrell, C., L. (Spring 1977). “The Political Offence Exemption in International Extradition: A Comparison of the United State, Great Britain and the Republic of Ireland”. *Marquette Law Review* 777 60(3), p.785.

<sup>407</sup> Kielsingard, M., D. (2013). “The Political Offence Exception: Punishing Whistleblowers Abroad”. *The European Journal of International law*, [www.ejiltalk.org/the-political-offence-exception-punishing-whistleblow](http://www.ejiltalk.org/the-political-offence-exception-punishing-whistleblow), accessed on 20 May 2014.

incident- test which requires that the act must be incidental to and forming part of political disturbances.<sup>408</sup> The French objective- test considers the direct injury to the rights of the state and the irrelevancy of the motives of the accused.<sup>409</sup> More interesting, the Swiss proportionality test examines the political motivation of the offender and the circumstances surrounding the commission of the crime, analysing the proportionality between the means and the political ends or the predominance of the political elements over the common crimes elements.<sup>410</sup> I find the Swiss approach more comprehensive. Indeed, the political motivation of the offender is important to establish in the appreciation of a political offence. The English approach seems to examine the offence in the opposite way, looking at it as incidental to political disturbances. Thus, the context of the offence seems to be the criteria for the British approach whereas the Swiss approach looks at the motivation of the offender in addition to the context.

#### 2.2.5. Double jeopardy

The double jeopardy rule, commonly known as *ne bis in idem*, is a well-known principle both in civil and common law legal systems around the world. It means that a person should not be prosecuted repeatedly on the basis of the same offence, acts or facts. The principle has a long history and is rooted in ancient Greek and Roman literature.<sup>411</sup> It has a twofold rationale. Firstly, *ne bis in idem* protects the individual against possible abuses of the state's *ius puniendi*.<sup>412</sup> Even when repeated prosecutions do not involve any abuse from the state, the defendant suffers additional burdens including duplicated costs of legal representation, coercive measures and psychological burdens associated with the extended procedures and the absence of finality.<sup>413</sup> Secondly, *ne bis in idem* is a guarantee of legal certainty in upholding the finality of judicial decisions or protecting the authority of a judgment.<sup>414</sup> It applies both in case of conviction and

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<sup>408</sup> *Idem*

<sup>409</sup> *Idem*

<sup>410</sup> *Idem*. Also Gossin. P. (2008). *International Mutual Legal Assistance in Switzerland*. UNAFEI, Resource material series no 77, p.20.

<sup>411</sup> Schomburg, W. (2012). "Criminal matters: transnational *ne bis in idem* in Europe- Conflicts of jurisdictions- transfer of proceedings". *ERA Forum* 13, p.312.

<sup>412</sup> Van Bockel, B. (2012). "The *ne bis in idem* principle in the European Union legal order: between scope and substance". *ERA Forum* 13, p.326.

<sup>413</sup> *Ibid.*

<sup>414</sup> *Ibid.*

acquittal decisions.

*Ne bis in idem* exists in many forms and it is deemed a constitutional and a procedural right in the legislation of many states. The principle is established as a human right protected under the ICCPR (Article 14 (7)), the Protocol 7 to the ECHR (Article 4(1)), the American Convention on Human Rights (Article 8(4)), the CISA (Article 54), and the CFREU (Article 50). *Ne bis in idem* features in extradition law too. It constitutes a ground for refusal to cooperate in the framework of international cooperation in criminal matters.<sup>415</sup> The principle appears in bilateral or multilateral conventions as either mandatory or optional ground for refusal. Examples of mandatory refusal include Article 9 of the 1957 European Convention on extradition, Article 53 of the 1970 European Convention on the international validity of criminal judgments, and Article 35 of the 1972 European Convention on the transfer of proceedings in criminal matters. An example of optional ground for refusal is Article 18 of the 1990 European Convention on laundering, search, seizure and confiscation of the proceeds of crime. Where a convention is silent, states are entitled to make a declaration on their refusal to cooperate in case it would result in a breach of *ne bis in idem* rule.

Traditionally, *ne bis in idem* has been elaborated as a principle that only applies nationally.<sup>416</sup> It is not binding as a general principle of international law.<sup>417</sup> Article 14(7) of the ICCPR and Article 4(1) of the Protocol 7 to the ECHR as referred to above acknowledge the principle from a domestic perspective. This means that, unless the rule is foreseen in an international convention, the prohibition to prosecute a person already acquitted or convicted for the same fact in a previous trial is binding only for the judges in the same national legal system; without a specific rule, judicial authorities are not bound by decisions taken in another state on the same fact committed by the same person.<sup>418</sup> In practice, if most states would not accept a request for assistance or an extradition request in relation with an offence for which the suspect is facing

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<sup>415</sup> Vervaele, J., A. (2005). "The transnational *ne bis in idem* principle in the EU. Mutual recognition and equivalent protection of human rights". *Utrecht Law Review* 1(2), p.103.

<sup>416</sup> Vervaele, J., A., *op. cit.*, p.100.

<sup>417</sup> Tracogna, C. (2011). "*Ne bis in idem* and conflicts of jurisdiction in the European area of liberty, security and justice". *Lex et Scientia International Journal* 18(2), p.57.

<sup>418</sup> *Ibid.*

trial under their jurisdiction, they would still accept it for foreign proceedings. However, many countries do not fully recognize the validity of foreign criminal matters judgments for enforcement in their legal order in the absence of a treaty. Most countries would subject it to the requirement that the facts judged by a foreign court were not committed, in whole or in part, within their territory. In an era of globalization where offenders can be easily reached and where more bilateral treaties are being made, states should increase recognition of foreign judgments in criminal matters which is less extended compared to civil and commercial matters.<sup>419</sup>

### Conclusion

This chapter has provided an overview of the development of international cooperation in criminal matters in modern time and its practice. It emphasises the conventional nature of extradition and its reliance on comity and reciprocity among states. The chapter points out recent developments in the practice of extradition, such as the possibility of rendition between states and international courts. It discusses the impact of global terrorism and transnational criminality in transforming extradition. This preliminary discussion on international cooperation in criminal matters globally and related principles is important since the thesis will reflect on them later when discussing cooperation in criminal matters in the EAC.

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<sup>419</sup> Michaels, R. (2009). *Recognition and Enforcement of Foreign Judgments*. Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press, p. 1-2.

### 3. THE EAST AFRICAN COMMUNITY

#### Introduction

This chapter describes the EAC both in geographic terms and shared social factors, such as language, culture, identity, religion. It argues that the integration spirit embraced by EAC states was forged by the British colonial power to ease the administration of acquired East African territories. The chapter contextualises the establishment of the EAC with regard to the rise of regionalism, firstly after the manifestation of the first generation regionalism spearheaded by the European Community, secondly with the worldwide expansion of the new regionalism after the end of the Cold War and the search for new ways to respond to the impact of globalisation. In particular, the second iteration of the EAC, twenty-two years after the demise of the first EAC, corresponds with the resuscitation of regionalism at the continental level in the form of the AU and the plan for establishing an African Economic Community by 2028.

The chapter suggests that various social, economic and political factors contributed to the collapse of the first EAC in 1977, ten years only after its launch, some of them dated before the formal establishment of the Community and were rooted in the British colonial administration.

The chapter discusses the integration plan of the new EAC. It argues that although the Community has established a customs union and a common market and launched the process for a monetary union and a political federation, the attainment of a full integration is seriously undermined by the unfinished work of each stage of integration, for example, the customs union, the common market, and by the lack of sufficient political will and commitment of the EAC Partner States in fulfilling their treaty obligations.

#### 3.1. Contextual background

This section discusses the making of the EAC from a historical point of view. In accordance with the criteria for defining a region, established in the theoretical chapter, the section emphasizes both geography and similar factors among the region's constituent states, such as ethnicity, religion, language, political and governance systems, and shared culture and historical experiences to describe the EAC.

### 3.1.1. East African countries

East Africa is often described as a group of countries that lie on the East coast of Africa. If one considers the Indian Ocean and the coastal geographic location of these countries, it would be more accurate to speak of Eastern Africa, including a larger number of countries including Ethiopia, Eritrea, Somalia, Djibouti, Sudan, Comoros, Seychelles and Mauritius. The first four countries constitute what is often named the Horn of Africa. The last three are islands in the Indian Ocean. Burundi and Rwanda are literally at the borderline of East and Central Africa. At the moment, six of the Eastern Africa countries above, namely Burundi, Kenya, Rwanda, Tanzania, Uganda and South Sudan, constitute the EAC. Kenya, Tanzania and Uganda are considered as the original founding members of the EAC, both in its first creation in 1967 and its relaunch in 1999. Burundi and Rwanda joined the Community in 2007 while South Sudan was admitted in 2016.

The geographical description of East Africa is important in the sense that it determined the history of the constituent countries since their creation; it also reveals an important characteristic: the divide between coastal countries (E.g. Kenya and Tanzania) and landlocked ones (E.g. Uganda, Rwanda). The coasts of Kenya and Tanzania were a gateway for merchants and explorers who conquered East Africa as early as the fourth century.<sup>420</sup> Some accounts of East Africa make reference to the Romans' expeditions in East Africa, ordered by Nero, as far back as the first century.<sup>421</sup> However, a more informed historical account of East Africa considers the seventh century, more precisely the death of the Prophet Muhammad in 632, as a time reference for early interactions of East Africa with the outside world. It is reported that following disputes for the succession of the Prophet, and indeed for the Caliph or the successor, two Omani dissidents, Suleiman and Said, fled to and established themselves in the coast of East Africa, precisely in Zanzibar.<sup>422</sup> This signalled the start of hundreds years of Arab rule in East Africa.

East Africa remained unknown to Europeans until the famous voyage to India of the Portuguese

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<sup>420</sup> Zoë M. and G.W. Kingsnorth. (1965). *An Introduction to the History of East Africa*. Cambridge University Press, p.3-5.

<sup>421</sup> C.P. Lucas. 1904. *Geography of South and East Africa. Historical Geography of the British Colonies*. Vol IV Part II, p.123-124.

<sup>422</sup> Zoë M. and G.W. Kingsnorth. (1965). *Op.Cit.*, p.3-5.

explorer, Vasco da Gama, who landed in Mombasa in 1498.<sup>423</sup> His discovery of the East African coast opened up two hundred years of the Portuguese domination of East Africa, which is said to not have had a significant impact except a few buildings, notably Fort Jesus in Mombasa, Fort Kilwa and a little chapel at Malindi.<sup>424</sup> The Portuguese were deposed by the Arab Sultan after a popular insurrection and the fall of Fort Jesus in the hands of Omani forces in 1698.<sup>425</sup> For the following a hundred and seventy years, the Sultan ruled East Africa until the arrival of European missionaries and merchants. The Berlin Conference in 1885 and the consequent Scramble for Africa sealed the future of East Africa and divided the territories of what is known now as Kenya, Tanzania and Uganda between Germany and Britain by two Treaties of 1886 and 1890.<sup>426</sup> According to the latter partition treaties, German East Africa comprised the territory of Tanganyika, which is today mainland Tanzania, as well as the territories of Ruanda and Urundi, currently the Republics of Rwanda and Burundi.<sup>427</sup> British East Africa consisted of the territories of present-day Uganda and Kenya and Zanzibar, the latter being declared a Protectorate in 1890 with a ten miles inland strip in which the Sultan retained his sovereignty.<sup>428</sup>

Despite Britain's growing interest in trade with the East in the 17<sup>th</sup> and 18<sup>th</sup> centuries, at first it entrusted chartered companies for the development of its protectorates in India, in South, West and East Africa.<sup>429</sup> The IBEA, created by Sir William Mackinnon in 1887 initially as the British East Africa Association to trade in the mainland dominions of the Sultan of Zanzibar, before it was reconstructed and given a royal charter under the new name, was thus entrusted with the administration of British territories in East Africa.<sup>430</sup> However IBEA faced enormous difficulties between 1891 and 1893 and became bankrupt before surrendering its charter to the British Government.<sup>431</sup> This move prompted the British Government to declare Uganda a Protectorate

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<sup>423</sup> *Ibid.*, p.10 and 16.

<sup>424</sup> Morgan W. T. W. (1973). *East Africa*. Longman. Durham, p.168

<sup>425</sup> *Ibid.*, p.148 and 168.

<sup>426</sup> Zoë M. and G.W. Kingsnorth. (1965). *Op.Cit.*, p.91 and 109.

<sup>427</sup> *Ibid.*, p.217.

<sup>428</sup> Morgan W. T. W. (1973). *East Africa*. *Op.Cit.*, p.168

<sup>429</sup> Zoë M. and G.W. Kingsnorth. (1965). *Op.Cit.*, p.91.

<sup>430</sup> Were, G.S. and Wilson, D.A. (1968). *East Africa Through a Thousand Years*. African Publishing Corporation. New York, p.155.

<sup>431</sup> *Ibid.*, p.160-161.



in 1894<sup>432</sup> and Kenya in 1895.<sup>433</sup> After Germany's defeat in the first World War, Britain captured the German Protectorate of Tanganyika, entirely establishing its power in the four territories until their independence in the early sixties.

The historical background of East Africa helps to understand the external impact of various powers and civilisations on the three states of Kenya, Tanzania and Uganda and how it contributed to making East Africa a homogenous region in which social, cultural, economic and political divergences progressively converged towards a unified bloc with which people across territorial boundaries identify themselves.

### 3.1.2. The people of East Africa: Ethnicities, cultures and languages

East Africa is home to 150 million people. Its multi-ethnic population is characterised by an intermixing of natives and sets of peoples that established themselves throughout the region as a result of years of conquest and colonisation. There are varying theories about original people of East Africa. What matters in this research is not so much an ethnographic presentation of EAC, rather pointing out the diverse ethnic faces of East Africa that include Bantu, Nilotic, as well as Hamitic and Semitic people. East Africa is a plural and culturally heterogeneous society in which people of Indian, Arab, Persian and European origins live along native indigenous. The European settlement in East Africa is obviously a result of the long British, Belgium and Portuguese ruling of the states of East Africa. The British settlement was conducted in two instances: direct and indirect.<sup>434</sup> There were Indians who settled in East Africa at a time when India was already a British colony.<sup>435</sup> Then there were also British settlers who came straight from Britain.<sup>436</sup> Colonial powers did not consciously pursue policies of nation-building in the political units they carved out of Africa.<sup>437</sup> Their main motive was purely economic: finding new markets for their products and extracting raw materials for the industries in Europe.<sup>438</sup> Like many regions in Africa, East

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<sup>432</sup> *Ibid*, p.161.

<sup>433</sup> Zoë M. and G.W. Kingsnorth. (1965). *Op.Cit.*, p.141.

<sup>434</sup> Ojienda T. and L.O. Aloo (2011). "Research Kenyan Law", p.3, at [www.nyulawglobal.org/globallex/Kennya](http://www.nyulawglobal.org/globallex/Kennya), accessed on 20 May 2017.

<sup>435</sup> *Ibid*.

<sup>436</sup> *Ibid*.

<sup>437</sup> Rosberg C. G. (1971). "National identity in African states." *African review* 1(1), p.80.

<sup>438</sup> Mbilinyi, S.M. (1973). "East African Export Commodities and the Enlarged European Economic Community". *The African Review: a journal of African politics development and international affairs* 3(1), p.86.

Africa suffered an artificial separation of people and a fragmentation of societies along ethnic and tribalistic lines.<sup>439</sup> African leaders, prompted by Pan Africanism ideology against colonialism and national oppression and exploitation, soon felt the urge to build common bonds of solidarity between people of Africa and to forge a sense of belonging and therefore a new African identity.<sup>440</sup> Among the prominent leaders, Presidents Kwameh Nkrumah of Ghana in West Africa and Julius Nyerere of Tanzania in East Africa, advocated two paths of the same vision: the unity of African people.<sup>441</sup> The latter President's commitment to the cause of freedom and unity of East African people was so strong that he once offered to delay Tanganyika's independence for a year if Britain would grant independence to Kenya and Uganda at the same time so that they could form a federation.<sup>442</sup> In a way, the common colonial past of the three states of Kenya, Tanzania and Uganda contributed to foster a sense of East African identity. Not only did they speak the same language, English, they also inherited economic structures that had been put in place by the colonial power: an East African railway, harbour, post and telecommunications, and airways services. Thus, these common services increased a sense of East Africanism among the inhabitants of the region and constantly reminded East Africans who used them that they shared a common vision and values, such as solidarity and unity.

Another crucial characteristic of the people of East Africa is a shared language, Kiswahili, as well as Swahili culture, that is a Bantu language much modified by contact with Arabic and which Arab and Swahili traders and slavers carried it across East Africa as far as the eastern DRC and it has become the *lingua franca*.<sup>443</sup> As such, Kiswahili is used by the EAC to foster a regional identity, prompting Partner States such as Rwanda to adopt it as an official language beside English,

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<sup>439</sup> 101. Matambalya, F.A.S.T. (2012). "The East African Community: Can it be a Model for Africa's Integration Process?". In: Mengisteab, K & R. Bereketeab (Eds.), *Regional Integration, Identity and Citizenship in the Greater Horn of Africa*. Boydell & Brewer, p.221

<sup>440</sup> Nabudere D. W. (1978). "Tanzania and Regional Integration in East Africa. Old and New Patterns". *African Review* 8(1-2), p.124.

<sup>441</sup> *Ibid.*

<sup>442</sup> Sebalu, P. (1972). "The East African Community". *Journal of African Law* 16(3), p.347. Also, Nabudere D. W. (1978). *Op.Cit.*, p.127.

<sup>443</sup> Zoë M. and G.W. Kingsnorth. (1965). *Op.Cit.*, p.143.

French and Kinyarwanda.<sup>444</sup> East Africa is an intricately multilingual region.<sup>445</sup> Over 310 indigenous and immigrant languages are spoken in East Africa, of which about 128 in Tanzania, 70 in Kenya, 73 in South Sudan, 43 in Uganda and 3 in Burundi and Rwanda.<sup>446</sup> Some of the East African languages have a cross-border character, presumably due to the artificial colonial partition of the states.

Two more defining elements need to be mentioned in relation to East African people. First is cultural diversity. This has been recognised by the EAC which objective, amongst others, is cooperation in the cultural realm.<sup>447</sup> Also, non – economic dimensions such as culture, religion and environment have been recognised as essential for the sustainability of regional cooperation schemes.<sup>448</sup> The second element is religion. Like culture, religion plays a considerable role in East African societies and is reflected in the societal organisation of the communities in the region. The main religions, Islam and Christianity, were acquired from colonial rulers and they have since been constituted an integral part of East Africans' customs. Whereas the two religions were brought in through the same gateway, the coastal land, Islam firmly established itself along the coasts as a result of Omani Sultan and Arab rulers who built the first mosques in the region and the settlement of Arabs in the region ever since. The predominance of Islam in the coastal areas does not obscure the fact that it is expanded in inland areas too. Christianity spread further inland compared to the coasts but there are extensive Christian communities in East African coastal areas too. The entrenchment of the two religions amongst East Africans should not hide the fact that since before the arrival of colonial rulers, East Africans had their own traditional religious practices and beliefs ranging from animism to spiritual gods or divinities.

The colonial legacy of East African people is not only linguistic or religious, but it includes similar government systems and comparable legal systems.

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<sup>444</sup> In a move to comply with Article 119 of the Treaty establishing the EAC, that provides for the development and promotion of indigenous languages especially Kiswahili as a lingua franca of the region, the lower chamber of the Rwandan Parliament passed an organic law adopting Kiswahili as an official language on 8<sup>th</sup> February 2017.

<sup>445</sup> Mwaniki, M. (2010). "Language management and the East African Community". *Language Matters* 41(2), p.264.

<sup>446</sup> *Ibid.* (Except figures for South Sudan).

<sup>447</sup> Articles 5, 117 and 119 EAC Treaty.

<sup>448</sup> Matambalya, F.A.S.T. (2012). *Op.Cit.*, p.224.

### 3.1.3. Political systems and governance

Despite relatively minor differences in the colonial history among the East African countries, with the original three founding members of the EAC, namely Kenya, Tanzania and Uganda, with South Sudan being former British colonies on the one hand and Burundi and Rwanda being former Belgian colonies on the other hand, their political systems display more similarities than divergences. They are all predominantly presidential political systems in which the Presidents hold broad power, including appointing members of government and, in some cases appointing certain members of Parliament, like in Rwanda.<sup>449</sup> Generally speaking, Presidents in these countries are also commanders in chief of the armies.

The 6 East African states are also constitutional republics with legislatures chosen through periodic multi-party elections.<sup>450</sup> They mostly achieved independence in the 1960's, like many African states, except South Sudan which is the youngest independent nation in the world, achieving independence in 2011 after a long fight which spanned two civil wars from 1955 to 1972 and from 1983 to 2005.<sup>451</sup> Chief among the EAC states, the United Republic of Tanzania, a union of the Republic of Tanganyika and the People's Republic of Zanzibar on 26 April 1964 and renamed as such in October of the same year, gained its independence in 1961 as Tanganyika. Burundi and Rwanda obtained independence concurrently on 1<sup>st</sup> July 1962; Uganda achieved independence on 9 October of the same year. Kenya and Zanzibar were granted independence in 1963.

Unlike the former colonial power, Britain, each East African state individually adopted a written Constitution considered as the supreme and overarching law. Incidentally, it can be argued that East African states have entered a new order in which new Constitutions have been adopted and have brought considerable changes in their political landscape. Except for Tanzania, which is praised for its exemplary social stability and political democracy in the region, all other East

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<sup>449</sup> In virtue of Article 80 (2) of the Rwandan Constitution, the President appoints 8 of 26 Senators who constitute the Senate, the upper chamber of the Rwandan Parliament.

<sup>450</sup> With the exception of Burundi which was first a constitutional monarchy at independence before it became a Republic in 1966, 4 years after its independence, all other EAC states became Republic at their accession to independence.

<sup>451</sup> Mertenskoetter P. and S. Luak (2012). "An overview of the Legal System and Legal Research in the Republic of South Sudan", p.1, at [www.nyulawglobal.org/globallex/South\\_Sudan](http://www.nyulawglobal.org/globallex/South_Sudan), accessed on 20 May 2017.

African states in a relatively recent past witnessed serious political turmoil and civil wars that culminated, in some cases like Rwanda, in Genocide and crimes against humanity, and in mass killings and serious violations of human rights particularly in Kenya, Burundi and South Sudan.

The new Constitutions were adopted in the aftermath of these troubling situations. In Kenya, after the 2008 electoral contestations and subsequent violence, a new Constitution was adopted in 2010, with transitional provisions for three years after which the Constitution was fully implemented in 2013.<sup>452</sup> Significant changes brought by the Kenyan Constitution include the exclusion of the Executive, including the President and Cabinet Secretaries, from membership in the Parliament.<sup>453</sup> One innovation of the Kenyan new Constitution is the creation of a second chamber of the Parliament, the Senate.<sup>454</sup> The 2003 Rwandan Constitution too created the Senate as an upper chamber of the Parliament. However, the Rwandan Constitution is overall a response to the many tribulations the country suffered from divisionism and sectarian politics that resulted in the Genocide against the Tutsi and the loss of a million Rwandan lives.<sup>455</sup> Thus, the greatest novelty of the Rwandan Constitution is the establishment of a number of institutional structures for rebuilding the nation. They include a National Unity and Reconciliation Commission, a National Commission for the Fight against Genocide, a National Commission for Human Rights, the Office of the Ombudsman, etc. In Burundi too, a new Constitution was adopted in 2005, at the end of a brutal civil war. The Constitution established a quota system of power sharing among the two main ethnic groups, with sixty percent of Hutu and 40 percent of Tutsi in the army, the government, the Parliament, the local administration as well as the public service.<sup>456</sup> In South Sudan, the signing of the Comprehensive Peace Agreement in 2005 and ultimately the referendum on self-determination in January 2011 and consecutive independence on 9 July 2011 represented a new order for the South-Sudanese nation.

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<sup>452</sup> Ojienda, T. and L.O. Aloo (2011). *Op.Cit.*, p.3-4.

<sup>453</sup> *Ibid.*, p.4

<sup>454</sup> *Ibid.*, p.8.

<sup>455</sup> Gasamagera, W. (2007). *The Constitution making process in Rwanda: Lessons to be learned*. 7<sup>th</sup> Global Forum for Reinventing Government. Vienna, p.9.

<sup>456</sup> Bizimana S. (2017). "The Burundi Legal System and Research", p.5, at [www.nyulawglobal.org/globallex/Burundi](http://www.nyulawglobal.org/globallex/Burundi), accessed on 20 May 2017.

The structures of local administration in the East African states are similar too. They can be said to be unitary states, with some exceptions, such as South Sudan and Kenya. The Kenyan 2010 Constitution introduced county governments with their own system of elected representation and the power to make laws in matters related to agriculture, county health, education, air and noise pollution, cultural and entertainment activities, animal control, firefighting and control of drugs.<sup>457</sup> South Sudan applies a similar principle of decentralised government and devolution of powers. It is a federal state divided into ten states each of which has its own Constitution and a legislative assembly with the power to pass legislation subject to the supremacy of national laws, in case of conflict.<sup>458</sup> At the moment, the state is applying a Transitional Constitution pending a definitive Constitution that the National Constitution Review Commission established in January 2012 is entrusted to produce.<sup>459</sup>

East African countries hold elections regularly. The presidential office term in all of them is 5 years, except in South Sudan where the presidential office term is 4 years. South Sudan's situation is an exception though as elections have never been held in the country since its independence from Sudan in 2011. Generally speaking, East African states are democracies, at least from the perspective of holding regular elections, although democracy is a much complex theory than elections which freedom and fairness are often contested in East Africa, except Tanzania. Assessing democracy in a wider dimension in 167 countries in the world, the Economist Intelligence Unit's 'Democracy Index' 2019 classifies Kenya, Tanzania and Uganda as hybrid regimes and Burundi and Rwanda as authoritarian regimes.<sup>460</sup> The Democracy Index recognises four regimes types as follows: Authoritarian, hybrid, flawed democracy and full democracy, the latter category comprising a limited number of countries of which Australia, New-Zealand, Canada, Norway, Sweden, Denmark, Finland, Iceland, Ireland and Switzerland.<sup>461</sup> It is based on 60 indicators grouped into five categories: electoral process and pluralism, civil liberties, the

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<sup>457</sup> Ojienda, T. and L.O. Aloo (2011). *Op.Cit.*, p.6, 7.

<sup>458</sup> Mertenskoetter P. and S. Luak (2012). *Op.Cit.*, p.2

<sup>459</sup> *Ibid.*, p.3.

<sup>460</sup> *The Economist Intelligence Unit. Democracy Index 2019*, p.43. n

<sup>461</sup> *Ibid.*, p.26 and 47.

functioning of government, political participation, and political culture.<sup>462</sup>

A last element of convergence of the political systems of EAC states is the doctrine of separation of powers enshrined in their Constitutions, to prevent abuse of power and to ensure checks and balances in the governance. In general terms, the legislatures of EAC states are either unicameral, precisely in Uganda, Tanzania and South Sudan, or bicameral like in Burundi, Rwanda and Kenya where the lower house, a Parliament, shares legislative powers with an upper house, a Senate. A discussion of the states' legal systems is more relevant to this research, beyond the mere judiciaries which in fact constitute a part of them.

#### 3.1.4. Legal systems

The main reason for this section is essentially to describe the similarities and divergences among the legal systems of the EAC states. To a considerable extent the legal systems of the EAC states are similar, despite their different origins that we may classify as common law legal systems on the one hand and civil law or romano-germanic legal systems, on the other hand. This classification means that four of the EAC Partner States, namely Kenya, Tanzania, South Sudan and Uganda apply common law, the core of which is the doctrine of judicial precedent or *stare decisis* that obliges judges to follow the rulings and determinations set by higher courts when a case involves similar facts and issues; and two other EAC states, Burundi and Rwanda apply civil law, the core of which is that laws and legal principles are codified and thus serve as source of law.

The nature of the legal systems of EAC derives from their colonial past. Britain applied common law, a tradition that emerged in England during the Middle Ages, in its East African colonies as it did in all its colonies across the continents.<sup>463</sup> Thus, the East African states of common law tradition adopted it as a consequence of their colonisation by Britain. Similarly, Belgium applied civil law in Burundi and Rwanda, a legal tradition that developed in the Middle Ages too and which origins date back to the Justinian Code in the sixth century and later influences of Canon

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<sup>462</sup> *Ibid.*, p.52.

<sup>463</sup> *The Common Law and Civil Law traditions*. The Robbins Collection. School of law (Boalt Hall). University of California. Berkley, p.1. Accessed at [www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html](http://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html), on 15 May 2017.

law and Germanic traditions throughout the medieval times and the Renaissance.<sup>464</sup> The adoption of this body of legal system by Burundi and Rwanda is undoubtedly the product of their Belgian colonial past, given the minimal impact of prior colonisation of East Africa by Germany and her indirect rule governance of German East Africa.

The analysis below will focus on the structures and the laws of the national legal systems in the EAC.

#### *3.1.4.1. The structure of EAC legal systems*

There are striking similarities in the structures of the legal systems across EAC states. First, their judiciaries are established by a Constitution that formally bestows them independence and autonomy through the establishment, for example, of judicial service commissions or councils with the power to appoint or remove judges from office as well as promoting them. In practice, however, their independence is not uniformly guaranteed in the EAC states. In Kenya, for instance, judges' salaries and benefits and the Judiciary Fund overall are charged on a Consolidate Fund to protect them from any manipulative attempt.<sup>465</sup> In Rwanda, they are charged on the same fund as the public service.

A major common feature of the organisational structures of the judiciaries in EAC states is a sharp distinction between higher courts and lower courts. With the exception of Tanzania whose highest court is the Court of Appeal of the United Republic of Tanzania, the Supreme Court is the highest court in all other EAC states. The higher courts comprise of a Supreme Court, a Court of Appeal and a High Court. The High Courts have original and unlimited jurisdiction in all the systems. Constitutional matters are within the jurisdiction of the Supreme Court in Burundi, Rwanda and South Sudan, within that of the Court of Appeal in Tanzania and within the High Court in Kenya and Uganda.

Mechanisms for alternative dispute resolution, such as conciliation and arbitration are also present in the legal systems of the EAC states, often inspired or imbued by local customs and involving lay people. In Burundi, the *Abashingantahe*, literally 'elders', and some other elected

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<sup>464</sup> See *Ibid.*, p.2

<sup>465</sup> Ojienda, T. and L.O. Aloo (2011). *Op.Cit.*, p.10.



citizens at the lowest level of the justice system are empowered to determine certain cases and conciliate the parties; they cannot impose sentences.<sup>466</sup> A similar institution exists in Rwanda where *Abunzi*, 'Conciliators', practice conciliation in sorting out certain matters with a legally defined jurisdiction.

The lower courts in the EAC states' legal systems comprise most of the following structures depending on each system: Magistrate courts, Court Martial, Primary courts, customary courts, Khadi's courts and tribunals and other specialised bodies. Magistrate courts in these EAC states' legal systems possess broad jurisdiction in criminal and civil matters, as well as an appeal jurisdiction. Their denominations vary according to each system. A quick glance at the lower courts clearly shows more similarities amongst the four Common Law jurisdictions in the EAC as a bloc, distinguishing them from the two Civil Law jurisdictions. The first element of convergence among the Common Law jurisdictions in the EAC is the existence of customary courts for the determination of cases of customary nature by traditional chiefs, within their jurisdictions and based on the customs, traditions, norms and ethics of the communities. The customary courts do not have jurisdiction to hear criminal cases. In South Sudan, they are granted concurrent jurisdiction with statutory courts along which they often operate.<sup>467</sup>

The second element of convergence among the Common Law jurisdictions in the EAC relates to their use of *Kadhi's* courts for the adjudication of matters of Islamic personal law, such as divorce and distribution of matrimonial assets, children guardianship and custody, succession and inheritance, between people who profess Islamic faith or in communities that follow Islamic law.<sup>468</sup> The use of *Kadhi's* courts for the administration of justice in accordance to Islamic legal system dates back to the establishment of the Sultanate Empire along the East African coasts at the beginning of the nineteenth century.<sup>469</sup> The English tolerated their existence alongside the English styled courts system, with a jurisdiction confined to Muslim personal matters.<sup>470</sup> *Kadhi's* courts, as well as customary courts, survived attempts to sweep them away after independence,

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<sup>466</sup> Bizimana S. (2017). *Op.Cit.*, p.5.

<sup>467</sup> Mertenskoetter P. and S. Luak (2012). *Op.Cit.*, p.2

<sup>468</sup> A *Kadhi* (sometimes also written Qahdi or Qadi) is a magistrate court in Islamic law.

<sup>469</sup> Oba, I.B. (2015).

<sup>470</sup> *Ibid.*

as part of an effort to integrate the legal systems, a process that started way before independence and which dominated the agenda of the Judicial Advisors' Conference held in Kampala, Uganda, in 1953.<sup>471</sup> However, an agreement between the Government of the United Kingdom, the Government of Kenya and Sultan of Zanzibar about the Coastal Strip, in October 1963, ensured the protection of the Muslim faith at all times and the preservation of *Kadhi's* courts.<sup>472</sup> The doctrine of *pacta sunt servanda* by virtue of which states must fulfil in good faith their commitments under international law, obliges Kenya to observe the agreement, hence the inclusion of *Kadhi's* courts in the Kenyan 2010 Constitution.<sup>473</sup> Overall, the survival of *Kadhi's* courts, and of customary courts too, in the EAC states has been the result of numerous legal reforms by the decision-makers, taking into account the wishes and aspirations of their peoples and adopting laws that reflect various existing traditions in the region.

#### 3.1.4.2. *The laws*

The laws of the EAC states too reflect the complexity of their national legal systems and the various influences that affected them. At first, they were mainly imported by the colonial powers for ease of administration.<sup>474</sup> In Rwanda and Burundi, the Belgian colonial power implemented Belgian law that was then codified for use in the two territories. Whereas Rwanda and Burundi have significantly reformed their legal systems during the transition and after the Genocide against Tutsis in Rwanda in 1994 and a decade of civil war that lasted until mid-2000 in Burundi, some of the colonial era Belgian civil codes are still used in the two countries while customary law has gradually and by and large been scrapped in an effort to ensure equality of citizens and between men and women in personal matters such as inheritance and matrimonial assets, land, marriage, etc.

In the EAC common law jurisdictions, the laws are largely based not only on British common law, but on Islamic law too and on customary law for personal or family matters.<sup>475</sup> The British settlers

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<sup>471</sup> Morris, H.F. (1970). "Some perspectives of East African legal history". *Crime in East Africa* 3, p.19-20.

<sup>472</sup> Ojienda, T. and L.O. Aloo (2011). *Op.Cit.*, p.11.

<sup>473</sup> *Ibid.*

<sup>474</sup> *Ibid.*, p.3.

<sup>475</sup> See Allot, A. (1976). "The Development of the East African Legal System during the Colonial Period". In: Low, D.A. and A. Smith. (Eds). *History of East Africa*. Clarendon Press. Oxford, p.348.

imported laws from Britain and British laws which had been codified in India, to apply to the East African protectorates.<sup>476</sup>

Overall, the laws of the EAC Common law jurisdictions are composed of statutes and acts of national Parliaments as well as received laws, that is to say specific acts of Parliament of the United Kingdom, English statutes of General Application in force in England on 12<sup>th</sup> August 1897 for Kenya, and on 22<sup>nd</sup> July 1920 for Tanzania, deemed to be the reception date for English law in the two countries, unless the statutes have been repealed by those of the receiving countries or by a latter English statute made applicable in the countries.<sup>477</sup> Treaties and International law too constitute a part of the laws of these jurisdictions as well as for their civil law counterparts. As for customary law, it is applied only in civil cases of personal or family matters and is in effect when it does not conflict with statutory law; Islamic law remains applicable to Muslims and in communities that follow Islamic law in matters of personal status. Unlike Kenya, Tanzania and Uganda, the laws of South Sudan do not include Islamic law. South Sudan's legal system is built on a combination of statutory and customary laws.<sup>478</sup> Whereas written law is the primary source of law in the EAC civil law jurisdictions, the doctrine of precedents or *stare decisis* is strongly applied in the EAC common law jurisdictions though Rwanda recently formalised the doctrine too.<sup>479</sup>

The Constitutions of all EAC jurisdictions assert human right and provide for a bill of rights. The Constitution of Burundi, unlike that of her peers, incorporates human rights instruments specifically, namely the Universal Declaration of Human Rights, the ICCPR, the ACHPR, the Convention on Elimination of all Forms of discrimination against Women and the Convention on the Rights of the Child, therefore making the legal system potentially monistic, at least with regard to these very specific instruments.<sup>480</sup> Otherwise, the legal systems of EAC jurisdictions are

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<sup>476</sup> Ojienda, T. and L.O. Aloo (2011). *Op.Cit.*, p.3.

<sup>477</sup> See Ojienda, T. and L.O. Aloo (2011). *Op.Cit.*, p.25. And Nyanduga, B.T. and C. Manning (2016). "Guide to Tanzanian Legal System and Research", p.4, at [www.nyulawglobal.org/globallex/Tanzania](http://www.nyulawglobal.org/globallex/Tanzania), accessed on 20 May 2017.

<sup>478</sup> Mertenskoetter P. and S. Luak (2012). *Op.Cit.*, p.2.

<sup>479</sup> Article 6 of the 2012 Civil, Commercial, Labour and Administrative Procedure Law of Rwanda establishes precedents second in the hierarchy of sources of law, after the law.

<sup>480</sup> Bizimana S. (2017). *Op.Cit.*, p.7-8.

dualistic and treaties need to be ratified and domesticated before they come into force.

### 3.2. The establishment of the EAC

In order to understand the present-day EAC, it is important to understand the historical process of the formation of the Community since the colonial period, the East African cooperation having emerged first as a British colonial administration project for a federation of its East African territories. This view corresponds to Historical Institutionalism's path dependence logic that submits the character of current institution to both current circumstances and the historical path to institutional development.

#### 3.2.1. British administration of East Africa

The beginning of British administration of East Africa in the mid-1890s ignited the idea of a united East Africa.<sup>481</sup> The British colonial administration entertained the idea of a federation of the East African territories of Kenya, Tanganyika and Uganda, for ensuring uniformity and reducing the administrative costs of the British Exchequer's subsidies.<sup>482</sup> In 1898, Lord Lugard predicted that there would come a time when East African territories would be administered as a single unit.<sup>483</sup> Similarly, the Special Commissioner to Uganda, Sir Harry Johnson, recommended after visiting East Africa that the territories of Uganda, Kenya and Zanzibar and British Somaliland should be replaced under one administration.<sup>484</sup> The British attempt to amalgamate the three East African territories into a single administration resulted in the establishment of a number of common services and institutional mechanisms to promote and institutionalise the colonial project. The common services were to operate in all British East Africa territories. They included the East African Railway, the East African Harbours, the East African Post and Telegraphs, and the East African Airways corporations, all established at different times between the 1890s and 1946. The institutions included, amongst others, the Court of Appeal for Eastern Africa created in 1902 and restructured in 1910<sup>485</sup>, the East African Currency Board established in 1905, the East African Meteorological Department, the East African Income Tax Board established in 1940, the

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<sup>481</sup> Mngomezulu, B.R. (2013). "Why did regional integration fail in East Africa in the 1970s? A historical explanation". *History and African Study seminar*, p.3.

<sup>482</sup> See, Sebalu, P. (1972). "The East African Community". *Journal of African Law* 16(3), p.345.

<sup>483</sup> Mngomezulu, B.R. (2013). *Op.Cit.*, p.3.

<sup>484</sup> *Ibid.*

<sup>485</sup> Ibhawoh, B. (2013). *Imperial Justice*. University Press. Oxford, p.35-36.

Directorate of Civil Aviation in 1946 and research institutions such as the Central Veterinary research organisation established in 1939 and the East African Industrial Research Organisation.

The quest for East African regional integration gained momentum when a White Paper was published in 1927 emphasising the importance of closer union in East Africa.<sup>486</sup> Several Commissions were appointed to explore the possibilities of East African federation and to make concrete resolutions. They included the Ormsby-Gore Commission in 1924, the Hilton Young Commission in 1927 and the Joint Selection Committee of both houses of the British Parliament in 1931.<sup>487</sup> The findings of the Commissions were not particularly exciting. The Ormsby-Gore Commission reported that there was little support and definite hostility for the idea of federation in East Africa.<sup>488</sup> The Hilton Young Commission drew attention to the nationalism entrenched among East Africans.<sup>489</sup> It mentioned the urgent need for coordination of policy on 'native affairs' and all matters concerning the relations between natives and immigrants.<sup>490</sup>

The creation of the East African Governors' Conference in 1926, marked a decisive step towards strengthening cooperation between the territories. The Governors' Conference was the first executive organ of the common services.<sup>491</sup> At its first meeting in 1926, in Nairobi, the Governors' Conference discussed the future of the region.<sup>492</sup> It was in part to remedy to the lack of a legal basis of the Governors' Conference that Britain created, by Order in Council, the East African High Commission that came into being on 1<sup>st</sup> January 1948, as a body corporate.<sup>493</sup>

### *3.2.1.1. The East African High Commission*

The EAHC provided a constitutional framework for the common services.<sup>494</sup> It was organised around three institutions: The Authority, the Central Legislative Assembly and the Executive.

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<sup>486</sup> Mngomezulu, B.R. (2013). *Op.Cit.*, p.4.

<sup>487</sup> Alusa, D. (2013). "Multipolar Politics and Regional Integration in East Africa: Opportunities and Challenges for Nonstate Actors". In: Omeje, K. and T.R. Hepner (Eds.). *Conflict and Peacebuilding in the African Great Lakes Region*. University Press. Indiana, p.71.

<sup>488</sup> Mngomezulu, B.R. (2013). *Op.Cit.*, p.4.

<sup>489</sup> *Ibid.*, p.6.

<sup>490</sup> *Ibid.*, p.4.

<sup>491</sup> Sebalu, P. (1972). *Op.Cit.*, p345.

<sup>492</sup> *Ibid.*

<sup>493</sup> *Ibid.*

<sup>494</sup> Ouko, R.J. (1969). "The East African Community". *International Review of Administrative Sciences* 35(1), p.47.

The Authority consisted of the Governors of the three territories sitting in a conference. Its Secretariat was headed by an Administrator and it was responsible for the administration of the common services.<sup>495</sup> The Central legislative Assembly enacted the laws providing legal authority to the services and voted their financial provisions.<sup>496</sup> It consisted of *ex-officio* members nominated and unofficial members elected by the Legislative Council of each territory.<sup>497</sup> The Executive was in charge of implementing the decisions of the Governors and to interpret the laws enacted by the Parliament.<sup>498</sup> The EAHC was limited by the lack of independent sources of revenue and by the scope of its competence.<sup>499</sup> In addition, Britain had a final verdict in case of disagreement on any contentious matter and the EAC was served by expatriates who viewed themselves as accountable to the Secretary for the colonies.<sup>500</sup>

As a result of Tanganyika's independence and the overall aspiration of all other territories to the same status, it became necessary to review the Order-in-Council of 1947.<sup>501</sup> At a conference convened in London to consider the future of the EAHC, delegates from the three territories and Zanzibar, Britain and the EAHC agreed to keep a joint administration of the services but to replace the EAHC by a new organisation.<sup>502</sup> In December 1961, the EAHC was replaced by the East African Common Services (EACS).<sup>503</sup>

### 3.2.1.2. *The East African Common Services*

Unlike the EAHC, the EACSO was the product of mutual consent and not of a foreign legal instrument.<sup>504</sup> It was more locally oriented and had a much firmer local base of operation.<sup>505</sup> The EACSO, like its predecessor the EAHC, consisted of the Common Service Authority, the Executive and the Central Legislative Assembly. The Authority was at first composed of the

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<sup>495</sup> Nsibambi, A.R. (1972). "Political Commitment and Economic Integration: East Africa's experience". *Africa Review* 2(1), p.190.

<sup>496</sup> Ouko, R.J. (1969). *Op.Cit.*, p.47.

<sup>497</sup> Sebalu, P. (1972). *Op.Cit.*, p.345

<sup>498</sup> Ouko, R.J. (1969). *Op.Cit.*, p.47

<sup>499</sup> Nsibambi, A.R. (1972). *Op.Cit.*, p.190.

<sup>500</sup> *Ibid*

<sup>501</sup> Ouko, R.J. (1969). *Op.Cit.*, p.47.

<sup>502</sup> *Ibid.*

<sup>503</sup> Mngomezulu, B.R. (2013). *Op.Cit.*, p.4.

<sup>504</sup> Ouko, R.J. (1969). *Op.Cit.*, p.48.

<sup>505</sup> *Ibid.*

President of Tanganyika and Governors of Kenya and Uganda.<sup>506</sup> After the independence of Uganda and Kenya, it became composed of the Presidents of the three territories.<sup>507</sup> The EACSO was given a broader scope for the administration and operationalisation of the common services including, in addition to the services provided by the EAHC, the common currency, customs regulations, tariffs and taxes for the region.<sup>508</sup> However, it soon become confronted by a series of challenges, amongst which an imbalance in the industrial development between the three countries as well as an uneven economic development, quantitative restrictions in inter-territorial trade and a structural challenge caused by the concentration of the common services in Kenya.<sup>509</sup> The concentration of the institutions of the EACSO in Nairobi was a source of constant irritation to Uganda and Tanzania and caused considerable dissatisfaction and disagreement over division of gains from cooperation and a perception by the latter two countries of a disproportionate share of the benefits of the Organisation.<sup>510</sup> The enduring challenges faced by the EACSO necessitated it being reconceptualised and restructured. The states' leadership perceived that the breakup of the EACSO, which had been built over forty years, would be expensive.<sup>511</sup> They sought to prevent its collapse and to compromise on certain issues. In order to find ways and means of strengthening East African economic cooperation, the Philip Commission was then appointed.<sup>512</sup> The Commission reviewed the whole integration arrangement and recommended the introduction of a new order to redress the economic and industrial imbalances and the reallocation of the headquarters of the various institutions of the EACSO to the three countries.<sup>513</sup> The treaty for East African Cooperation proposed by the Philip

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<sup>506</sup> Sebalu, P. (1972). *Op. Cit.*, p.347.

<sup>507</sup> *Ibid.*

<sup>508</sup> Mngomezulu, B.R. (2013). *Op.Cit.*, p.4.

<sup>509</sup> Ouko, R.J. (1969). *Op.Cit.*, p.48.

<sup>510</sup> Nsibambi, A.R. (1972). *Op.Cit.*, p.201.

<sup>511</sup> Green, R. H. (1978). "The East African Community: A Valediction forbidding Mourning". *The African Review* 8(1), p.3.

<sup>512</sup> Ouko, R.J. (1969). *Op.Cit.*, p.48.

<sup>513</sup> Mbogoro, D.A.K. (1978). "The East African Community: An Economic Analysis of the integration scheme". *African review* 8(1-2), p.60.

Commission was signed by the Presidents of the three Partner States on 6<sup>th</sup> June 1967 and it became effective on 1<sup>st</sup> December 1967.<sup>514</sup>

### 3.2.2. The East African Cooperation

The Treaty for East African Cooperation was signed at a time of overall enthusiasm for regionalism by the newly independent African States who considered it as a vehicle for economic development.

#### 3.2.2.1. *Rationale for East African cooperation*

The Charter of the OAU, established in 1963, envisaged that African states would gradually work towards regional and interregional cooperation as a means towards achieving accelerated economic progress and continental unity.<sup>515</sup> This same economic purposes encouraged the leaders of East Africa to harness regional cooperation for the unity of their people. East African leaders were also influenced by the Pan African ideology that advocated the unity of African people. Originally, Pan Africanism was connected to anti-imperialism and the struggle against colonialism and imperialist oppression and exploitation of African people.<sup>516</sup> However, the Pan Africanism that emerged in East and Central Africa in the late 50s strived not only for political independence but for economic independence too, a Pan African grand dream in which a united Africa would become an economic giant with a large market to withstand global competition.<sup>517</sup> In East Africa, the President of Tanzania, Julius Nyerere, was a proponent of Pan Africanism. His vision of regionalism in Africa was labelled the 'gradualist approach', since he argued that Africa had to unite at the regional level before a continental union could be realised.<sup>518</sup> A competing 'maximist' approach was advanced by the first President of Ghana, Kwameh Nkrumah, who advocated a continental political federation in the form of a common government with politico-military and economic decision-making powers.<sup>519</sup> Although this plan was defended vigorously

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<sup>514</sup> Malecela, J.S. (1972). "What next for the East African Community? A case for Integration". *The African Review* 2(1), p.211.

<sup>515</sup> Ouko, R.J. (1969). *Op.Cit.*, p.47.

<sup>516</sup> Nabudere D. W. (1978). *Op.Cit.*, p.124.

<sup>517</sup> *Ibid.*, p.125.

<sup>518</sup> Thonke, O. and A. Spliid. (2012). "What to expect from regional integration in Africa". *African Security Review* 21(1) March, p.45.

<sup>519</sup> Kitipov, J. (2012). "African integration and inter – regionalism: The regional economic communities and their relationship with the European Union". *Strategic Review for Southern Africa* 34(1), p.26.



by many states at the Constitutive Assembly of the OAU in 1963, it was rejected in favour of the gradualist functional plan of progressive stages as the best road to economic and political integration.<sup>520</sup> The EAC established by the Treaty for East African Cooperation on 6 June 1967 which entered into force on 1<sup>st</sup> December 1967 was established in the same perspective and it aimed essentially at economic integration of the three states of Kenya, Tanzania and Uganda. Article 1 of the Treaty provided that ‘the Contracting Parties establish among themselves an East African Community, and, as an integral part of such Community, an East African Common Market’. The Community was built on three pillars: The Common Market, the General Fund services and the Corporations. The Corporations consisted of the East African Railway, the East African Harbour, the East African Posts and Telecommunications, and the East African Airways. The General Fund services comprised all other twenty-seven services specified in Part A of Annex IX. They include, for example, the Secretariat of the Community, and different technical and research institutions established at different times during the history of the EAC.

### 3.2.2.3. *Achievements*

The first concrete manifestation of the economic integration plan of the Treaty for East African Cooperation was the establishment of a customs union with a CET for all goods imported outside the Community and the removal of trade restrictions among the Partner States<sup>521</sup>. Scholars unanimously argue that the removal of trade restrictions increased intra-trade, that is, trade within the Community, though not significantly.<sup>522</sup> It is argued that the Partner States traded more with third countries, especially European countries and the former colonial power Britain, than amongst themselves. The reason for that contrast in the total trade in East Africa in the mid-1970s was the imbalanced trade patterns inherited from colonisation which created a certain dependency on manufactures from the European market.<sup>523</sup> Scholars also point out a sharp increase in the Partner States’ trade with their immediate neighbours, Somalia, Ethiopia, Zambia and Rwanda and Burundi triggering their interest in the Community and their formal application

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<sup>520</sup> *Ibid.*

<sup>521</sup> The EAC abolished trade restrictions except in safety and security circumstances specified in Article 12(1), such as the protection of human, animal or plant health, the control of nuclear materials, etc.

<sup>522</sup> See, for example, Malecela, J.S. (1972). *Op.Cit.*, p.212 and, Sebalu, P. (1972). *Op.Cit.*, p.457.

<sup>523</sup> Mbilinyi, S.M. (1973). *Op.Cit.*, p.80.

to be members.<sup>524</sup> As part of its external trade, the Community entered into association with the European Economic Community in 1968.<sup>525</sup> The five year association trade agreement, often referred to as the Arusha Agreement, was signed on 26 July 1968.<sup>526</sup> It gave privileges to the Community allowing East African products to enter the European common market freely on a basis of a reciprocity for European products in East Africa.<sup>527</sup>

Considering the concentration of the common services in Kenya and the resulting uneven distribution of benefits among East African States, the Treaty for East African Cooperation redistributed the headquarters of the six important institutions of the Community on the basis of two institutions per state, as follows: the headquarters of the Community, including the Tribunal and the Central secretariat as well as the EAHC in Tanzania, in Arusha and Dar es Salaam respectively; the EADB and the EAPT in Kampala, Uganda; the EARC and the EAAC in Nairobi, Kenya.<sup>528</sup> Despite the redistribution, tensions persisted over the gains in addition to other strains and stresses that led to the collapse of the EAC in 1977.

#### *3.2.2.4. The disintegration of the EAC*

Like its formation, the demise of the first EAC can be understood in terms of Historical Institutionalism's path dependence logic. Some scholars have argued that the demise of the first iteration of the EAC needs to be considered in retrospective and to include the Community's formative period. Mngomezulu argues that the EAC died a slow death and fell apart as it was constituted.<sup>529</sup> He also argues that the rift among East African territories was already evident by the mid-1960s.<sup>530</sup> Similarly, Green suggests that the EAC might have been doomed from the start.<sup>531</sup>

Generally speaking, the factors that led to the dissolution of the EAC in 1977 can be said to be of a political, economic and social nature. Among the political reasons, there was a sharp contrast

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<sup>524</sup> See Sebalu, P. (1972). *Op.Cit.*, p.457

<sup>525</sup> Taguaba, L. (1978). "The Arusha Agreement: Origins, Meaning and Future of Association with the EEC". *African Review* 8(1-2), p.156.

<sup>526</sup> *Ibid.*

<sup>527</sup> See Nsibambi, A.R. (1972). *Op.Cit.*, p.204.

<sup>528</sup> Article 87 EAC Treaty

<sup>529</sup> Mngomezulu, B.R. (2013). *Op.Cit.*, p.6.

<sup>530</sup> *Ibid.*

<sup>531</sup> Green, R. H. (1978). *Op.Cit.*, p.24.

in the political economy of the East African states and opposed ideologies. Kenya and Uganda practised capitalism with state interventionism.<sup>532</sup> Uganda followed the 'Common Man's Charter' and moved towards revolutionary Africanisation of its business sector.<sup>533</sup> Tanzania was officially committed to African agrarian socialism, *Ujamaa* (family-hood).<sup>534</sup> The Cold War and the foreign influence added to the political divergences between the three Partner States. In a capitalist world, western countries opposed Tanzania's socialism. Kenya was assisted by the western bloc while Tanzania was linked to the eastern bloc and Uganda was assisted particularly by the Soviet Union.<sup>535</sup>

The ideological differences undermined the EAC and affected its future. Tanzania perceived Kenya as pursuing inequality at home and exploitation regionally.<sup>536</sup> Both Kenya and Uganda perceived Tanzania as dangerously leftist.<sup>537</sup> The ideological differences aggravated the dissimilarity of interests in East Africa. The attempt by the Ugandan President Milton Obote to move to the left led to a *coup d'état* by Idi Amin, on 25 January 1971.<sup>538</sup>

The overthrow of Obote by Amin engendered personal acrimony between the heads of state and political retaliations in East Africa, affecting decision-making in the Community. This incident had a negative impact and strained cooperation. The presidents of Tanzania and Kenya did not recognise the new military government in Uganda and they resented Idi Amin.<sup>539</sup> President Nyerere of Tanzania entertained a strong personal relationship with President Obote and provided him political asylum in Tanzania.<sup>540</sup> He opposed any Amin appointment to leadership positions in the EAC and refused to convene the meetings of the East African Authority as long as Amin was in power.<sup>541</sup> Subsequently, there were clashes at the border of Uganda and Tanzania as well as constant political squabbles and armed border confrontations between Uganda and

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<sup>532</sup> *Ibid.*, p.19.

<sup>533</sup> Mngomezulu, B.R. (2013). *Op.Cit.*, p.7.

<sup>534</sup> *Ibid.*

<sup>535</sup> *Ibid.*, p.5

<sup>536</sup> Green, R. H. (1978). *Op.Cit.*, p.19.

<sup>537</sup> *Ibid.*

<sup>538</sup> *Ibid.*, p.19-29

<sup>539</sup> See Nsibambi, A.R. (1972). *Op.cit.*, p.193.

<sup>540</sup> Mngomezulu, B.R. (2013). *Op.Cit.*, p.10.

<sup>541</sup> *Ibid.*

Kenya.<sup>542</sup> The political and military hostility between the Amin regime and Tanzania first, then with Kenya, did not augur well for regional integration. It affected economic negotiations on road transport, tourism, standard, industrial allocation and the economic growth of the three countries.<sup>543</sup>

In the economic sphere, structural challenges were so intense that the Partner States did not agree on the full coordination of their national monetary policies, their respective national income, their employment policies or on location of industries.<sup>544</sup> Differences in economic development and the inability of the Community to bridge the gap in their industrial development worsened the situation. Inadequate funding and financial problems surfaced when Kenya announced her withdrawal on refusing to pay its contribution of 800 million Shillings to the General Fund services.<sup>545</sup>

The global economic crisis in the 1970s provided a contextual factor which weakened the EAC. With increasing global foreign exchange stringency, Kenya came to perceive its EAC corporation headquarters' external payments as a foreign exchange drain and tried to compensate by slowing or halting transfers to EAC Corporate in Tanzania.<sup>546</sup> The foreign exchange crisis between the two countries led Kenya to claim 200 million Shillings from the EA Airways for hosting it on its soil.<sup>547</sup> Tanzania retaliated by refusing to allow Kenya's heavy transport to use its motorways.<sup>548</sup>

Imperialism too played a vital role in the collapse of the Community. The exploitative and oppressive relationships introduced by imperialist monopolies ruined the Community. Transnational corporations battled for the monopoly over capital export outlets, markets and sources of raw materials in the newly independent states.<sup>549</sup> The decision by the United States

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<sup>542</sup> *Ibid.*

<sup>543</sup> See Green, R. H. (1978). *Op.Cit.*, p.7-8.

<sup>544</sup> Nsibambi, A.R. (1972). 203.

<sup>545</sup> Nabudere D. W. (1978). *Op.Cit.*, p.149.

<sup>546</sup> Green, R. H. (1978). *Op.Cit.*, p.10-11.

<sup>547</sup> *Ibid.*, p.18.

<sup>548</sup> Mngomezulu, B.R. (2013). *Op.Cit.*, p.11.

<sup>549</sup> Nabudere D. W. (1978). *Op.Cit.*, p.134.

and the United Kingdom to recall their aircraft which had been used by the region, unless they were paid substantial amounts by the EAA, aggravated the situation.<sup>550</sup>

The world economic crisis reduced the gains and raised perceived costs of the EAC. The perception of an unfair sharing of economic benefits accruing from regional markets and a lack of formula to deal with the problem irritated Uganda and Tanzania and led to fears and resentments against Kenya.<sup>551</sup> The compensatory and corrective measure taken to rectify the economic imbalance among the three states were not adequate.<sup>552</sup> As a result, Kenya experienced economic growth at the expense of Tanzania and Uganda, whose economies stagnated. The inequitable distribution of costs and benefits among the Partner States meant that the EAC produced trade diversion and higher costs for Tanzania and Uganda.<sup>553</sup> Consequently, there was a rise of economic nationalism, with national interests prevailing over regional sentiments.<sup>554</sup>

The rise of economic nationalism affected regionalism in East Africa. Political leaders were not prepared to cede their newfound political and economic sovereignty in favour of a successful Community. In addition, there was almost no involvement of the people, manifested in the concentration of the powers in the hands of the Heads of state through the Summit. The Community depended on their goodwill to resolve issues, rather than upon strong institutions.

#### *3.2.2.5. The revival (revitalisation) of the East African cooperation*

After the dissolution of the EAC in 1977, the three states of Kenya, Tanzania and Uganda negotiated a Mediation Agreement for the Division of Assets and Liabilities, which was signed in 1984.<sup>555</sup> One of the terms of the Mediation agreement provided that the three states agreed to explore areas of and make concrete arrangements for future cooperation.<sup>556</sup> Subsequently, the

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<sup>550</sup> See Mngomezulu, B.R. (2013). *Op.Cit.*, p.5.

<sup>551</sup> See Kamala B., D. (2006). *The Achievements and Challenges of the New East African Community Cooperation*. Open lecture. Business School. University of Hull, p.13.

<sup>552</sup> See See Mngomezulu, B.R. (2013). *Op.Cit.*, p.8.

<sup>553</sup> Holmes, P. and J. Rollo. (2012). *EAC Integration: Some lessons from the EU Experience*. TradeMark East Africa, p.3. Also, see Koroma, S. Mosoti, V. et. al. (2008) "Towards an African common market for agricultural products". *FAO Review of Agricultural Commodity Policies* 2, p.2.

<sup>554</sup> See See Mngomezulu, B.R. (2013). *Op.Cit.*, p.7.

<sup>555</sup> Matambalya, F.A.S.T. (2012). *Op.Cit.*, p.199.

<sup>556</sup> Ibid.

Heads of state of Kenya, Tanzania and Uganda held a meeting in Harare, in 1991, and reached an agreement for the establishment of a Permanent Tripartite Commission for East African Cooperation, signed on 30 November 1993.<sup>557</sup> Full cooperation officially started on 14 March 1993 with the launching of the Secretariat of the Permanent Tripartite Commission at the headquarters of the EAC in Arusha and a proviso that the cooperation will be upgraded at a later stage.<sup>558</sup> Hence, the three Heads of state, at their second Summit in Arusha on 29 April 1997, directed the Permanent Tripartite Commission to start upgrading the agreement establishing the Permanent Tripartite Commission for East African Cooperation into a treaty.<sup>559</sup> On 2<sup>nd</sup> January 1999, the EAC Summit resolved to establish the EAC in its original form by the end of July of the same year.<sup>560</sup> One can see here a Constructivist Institutionalism's important tenet: that actors create, recreate or maintain institutions, and their preferences are not constrained by institutions. Subsequently, the Treaty for the establishment of the EAC was signed in Arusha, Tanzania, on 30 November 1999 and entered into force on 7 July 2000, following ratification and deposit of the instruments of ratification with the Secretary General by all the three Partner States. The new EAC considered the possibility for expanding it to include countries like Rwanda.<sup>561</sup> Kenya and Tanzania's opposition to such development which they considered as premature prevailed over Uganda's favourable view.<sup>562</sup> Thus, the reinvigorated EAC started with the three original Partner States, namely Kenya, Tanzania and Uganda. Burundi and Rwanda acceded to the Treaty on 18 June 2007 and became full members of the Community on 1<sup>st</sup> July 2007. South Sudan acceded to the Treaty on 15<sup>th</sup> April 2016 and became full member on 15 August 2016.

### 3.3. The new EAC

This section puts the revived EAC in perspective at global and continental levels. It presents salient features of the EAC and examines the achievements of the Community with regard to the objectives set in its constitutive treaty.

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<sup>557</sup> Kamala B., D. (2006). *Op.Cit.*, p.9.

<sup>558</sup> Mngomezulu, B.R. (2013). *Op.Cit.*, p2.

<sup>559</sup> Mwaniki, M. (2010). *Op.Cit.*, p.268.

<sup>560</sup> Mngomezulu, B.R. (2013). *Op.Cit.*, p.2.

<sup>561</sup> *Ibid.*

<sup>562</sup> *Ibid.*, p.3.

### 3.3.1. Context

The rebirth of the EAC is associated with the worldwide trend and expansion of the new regionalism, triggered partly by the end of the Cold War and partly by the poor performance of multilateral trade arrangements under the auspices of the WTO.<sup>563</sup> Regional integration schemes flourished around the world, such as the EU, NAFTA, MERCOSUR, ASEAN and many other bilateral preferential arrangements.<sup>564</sup> Africa has not been an exception; numerous regional integration arrangements were established, the EAC being one of them.

African countries embraced regional integration as a key strategy in their economic development and increased trade and investment.<sup>565</sup> Having realised that Africa's problems of poverty, disease and lack of education can only be solved through a rational and systematic approach based on the people's unity and determination, the former OAU adopted the Lagos plan of Action for the Economic Development of Africa in 1980, with the objective of establishing the AEC. Consequently, the treaty establishing the AEC was adopted in Abuja, in June 1991, and entered into force on 12 May 1994. The AEC was established as an integral part of the OAU, with the objective of forming an economic and monetary union by 2028.<sup>566</sup> The integration strategy of the AEC identifies RECs as building blocks for the gradual establishment of a continental economic integration.<sup>567</sup> The EAC constitutes one of the eight RECs recognised by the AEC, alongside the AMU, the ECOWAS, the ECCAS, the CENSAD, the IGAD, the SADC and the COMESA.<sup>568</sup> The disintegration of the first EAC did not bury the integration spirit in East Africa. The incorporation, in the Mediation Agreement amongst the EAC Partners States in 1984, of a provision for possible future cooperation among the Partner States was likely motivated by the economic integration aspiration of the OAU's 1980 Lagos Plan of Action. Hence, the current revived EAC is essentially an economic integration scheme with the overall duty of the RECs for establishing a customs

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<sup>563</sup> See Goto, J. (2012). *Regional Integration in East Africa Diversity or Economic Conformity*. JICA Research Institute Working Paper 46, p.2.

<sup>564</sup> *Ibid.*

<sup>565</sup> Koroma, S. Mosoti, V. et. al. (2008) "Towards an African common market for agricultural products". *FAO Review of Agricultural Commodity Policies 2*, p.1.

<sup>566</sup> See Koroma, S. Mosoti, V. et. al. (2008). *Op.Cit.*, p.24 and 26.

<sup>567</sup> *Ibid.*

<sup>568</sup> Article 130(2) EAC Treaty provides that 'the Partner States regard the Community as a step towards the achievement of the objectives of the Treaty Establishing the African Economic Community'.

union and a common market.

### 3.3.2. Objectives and principles

The main objective of the renewed EAC is the attainment of economic, social and political integration in East Africa. This aim of the Community, as articulated in Article 5 of the EAC Treaty, is 'to develop policies and programmes aimed at widening and deepening cooperation among partner states in the political, economic, social and cultural fields, in research and technology, defence, security and legal and judicial affairs, for their mutual benefit'. Accordingly, the EAC aims at ever closer integration among the Partner States. Integration is certainly deepening in terms of the expanding scope of the laws, policies and regulations that are giving effect to the commitment to closer economic, social and political cooperation.<sup>569</sup> The deepening of integration is manifested in the progression towards the various stages of integration, for example from customs union to common market and to monetary union, and through the signing of relevant protocols which clarify the individual stages of integration and constitute, with treaties, the legal anchor of integration scheme.

As a regional trade agreement, the EAC treaty was notified to the WTO. It could be argued that this notification and the recognition, by the AEC, of a REC status to the EAC transforms the Community from a passive object to an active subject, or enhances its regionness and capacity to act. WTO rules have an impact on international trade. Of particular significance in this chapter, Article XXIV of the GATT and Article V of the GATS regulate regional trade agreements.<sup>570</sup> Trade integration is an integral part of regional integration. Regional integration in the EAC is pursued not just in trade and trade facilitation and areas such as sanitary and phyto-sanitary standards, technical standards, investment, competition, intellectual property rights for the expansion of economic growth but for the benefits of regional cooperation on other issues too, such as political stability and security, shared natural resources, infrastructure projects and border administration. Article 3 of the EAC Treaty provides the requirements for accession by a foreign country as member or associate to the Treaty. The requirements include amongst others adherence to the Community's principles, market driven economy and geographical proximity

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<sup>569</sup> Society for International Development (2012). *The State of East Africa*, p.8.

<sup>570</sup> Matambalya, F.A.S.T. (2012). *Op.Cit.*, p.206.



and interdependence with the Community. Admission is considered on the basis of the EAC Procedure for Admission and is exclusively a function of the EAC Summit of Heads of State.<sup>571</sup> The widening of the new EAC has materialised through the accession of Burundi and Rwanda to the Treaty in 2007 and South Sudan in 2016. As suggested in the theoretical framework, the EAC, as a region, can be viewed as a social construct and a politically contested space. It is expected to continue expanding further eastward and southward following the expression of interest by neighbouring countries and their membership applications. The Republic of Sudan formally applied to join the EAC in 2011, a few months ahead of the region's most contiguous and now newest member, South Sudan.<sup>572</sup> Somalia also formally applied to join the EAC in 2012.<sup>573</sup> The DRC which shares borders with five of the six current Partner States of the EAC expressed interests to join Community too.

The EAC Treaty defined a set of fundamental and operational principles that guide the achievement of its objectives. The principles determine the political, economic and social governance system of the Community. Articles 6 and 7 EAC Treaty reads “commitment to good governance, rule of law, human rights and a belief in people-centered and market-driven cooperation”. The creation of norms, values, moral ideas, or practices and procedures is characteristic of states grouped in regionalism. These principles help to shape common political ground in the process of economic, social and political integration of East African countries, which political organisation and governance are perceived as essentially ethnocratic, except for Tanzania, and militaristic, with a substantial militarisation of political space in Burundi, Rwanda and Uganda.<sup>574</sup>

### 3.3.3. Organs of the EAC

The organisational structure of the EAC is set out in Article 9 EAC Treaty. It includes the following organs:

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<sup>571</sup> Article 11(9) EAC Treaty.

<sup>572</sup> Society for International Development (2012). *Op.Cit.*, p.8.

<sup>573</sup> *Ibid.*

<sup>574</sup> See, Matambalya, F.A.S.T. (2012). *Op.Cit.*, p.220.

### 3.3.3.1. *The Summit*

The composition and role of the Summit are defined under Articles 10 and 12 EAC Treaty. The Summit comprises the heads of state or government of the Partner States. It is the EAC counterpart of the European Council which also consists of all the EU Heads of State or Government. The Summit is responsible for the overall policy direction and functioning of the Community. Like the European Council,<sup>575</sup> the Summit gives general directions and impetus to the development and achievement of the objectives of the Community. As such, it is the vision setting organ of the Community. It operates on a yearly rotating chairmanship and meets on a yearly basis minimum,<sup>576</sup> while the European Council meets at least twice every six months or whenever necessary. Like the European Council which almost always decides by consensus, all decisions of the Summit are taken by consensus (Article 12(3) EAC Treaty). Therefore, the Community's survival depends of the goodwill of the heads of states or perhaps the Partner States. The quest for different interests and the divergences in the economic levels and priorities of the members in a regional organisation often makes consensus difficult to reach. The EAC Treaty recognises the principle of variable geometry which allows progression in cooperation among groups within the Community for wider integration schemes in various fields and at different speeds.<sup>577</sup> The variable geometry principle thus moderates the consensus decision taking that at time can hamper the integration progress. The decision by the heads of state of Kenya, Uganda and Rwanda to revamp the Northern Corridor against the will of Tanzania in 2013 explains how coalitions of power are sometimes created in regional organisations and the relationship between weaker and stronger members. From the perspective of rational choice institutionalism, the three heads of states can be seen in this case as rational actors pursuing their preferences in a logic of calculation. The fact that Tanzania, the second largest economy in the EAC, does not need trade corridors like smaller landlocked fellow Partner States Rwanda, Uganda and Burundi, explains its opposition.

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<sup>575</sup> See Article 15 TEU.

<sup>576</sup> Article 12 EAC Treaty.

<sup>577</sup> Article 7(e) EAC Treaty.

### 3.3.3.2. *The Council of ministers*

The Council of Ministers is the main policy organ of the Community (Article 14 EAC Treaty) as far as implementation of the Treaty provisions and integration programmes are concerned. It can initiate and submit bills to the EALA for consideration and enactment into law. Although it can be considered as the counterpart of the Council of Ministers of the EU, it is fair to say that the latter enjoys greater powers and competences, its main functions being legislation, the budget, policy making, coordination of execution, and the foreign policy of the EU. Also, no legislation can be adopted without the Council of Ministers of the EU although in most cases the Council needs the European Parliament to pass a law.<sup>578</sup> The Council of Ministers of the EAC is made up of ministers responsible for EAC affairs in the Partner States, such other ministers of the Partner States as each may determine, and the Attorney General of each Partner State. (Article 13 EAC Treaty). The Council of Ministers of the EU too is composed of ministers of the Member States,<sup>579</sup> their attendance at the meeting of the Council depending on the topic of discussion. While the Council of Ministers of the EAC meets twice a year, the Council of Ministers of the EU meets in ten different configurations most which meet once or twice a month.<sup>580</sup> Like the Summit, the Council's decisions are taken by consensus too. The Council of Ministers of the EU uses a different decision-making mechanism that includes simple majority voting, qualified majority voting and unanimity. It has a six months rotating presidency.<sup>581</sup>

### 3.3.3.3. *The Coordination committee*

The Co-ordination Committee consists of Permanent Secretaries responsible for EAC affairs in each of the partner states and such other Permanent Secretaries of the Partner States as each may determine (Article 17 EAC Treaty). It is mainly in charge of implementing the decisions of the Council; it serves as a watchdog for the community, making and submitting recommendations on the implementation of the Treaty; it reports to the Council of Ministers (Article 18 EAC Treaty). It is responsible for regional cooperation and coordinates the activities of the Sectoral Committees. At this stage, the organizational structure of the EU is slightly different to that of the EAC but

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<sup>578</sup> Cuyvers, A. (2017). "The Institutional Framework of the EU". In: Ugirashebuja, E., Ruhangisa, J.E., Ottervanger, T. and A. Cuyvers (Eds). *East African Community Law*. Brill Nijhoff. Leiden, p.89.

<sup>579</sup> Article 16 TEU.

<sup>580</sup> Cuyvers, A. (2017). *Op.Cit*, p.88, 89.

<sup>581</sup> Article 16(9) TEU

equally integrates the national systems as opposed to a separate system. A body of permanent representative of the Member States (COREPER in French, *Comité des Représentants Permanents*) sits directly below the Council (Articles 16(7) TEU and 240(1) TFEU). It prepares all the meetings of the Council. In turn, the work of COREPER is prepared by over 250 different working groups where national experts meet for preparatory work.<sup>582</sup>

#### 3.3.3.4. Sectoral Committees

Sectoral Committees are responsible for preparing detailed plans and setting out priorities for their respective sectors (Article 21 EAC Treaty). They basically conceptualize programs and monitor their implementation. They are established by the Council of Ministers on the basis of the recommendations of the Coordination Committee which spells out their composition and functions (Article 20 EAC Treaty). Sectoral Committees meet as often as necessary (Article 21 EAC Treaty). Relevant sectoral committees established include the Sectoral Committee on Co-operation in Defence, as well as an Inter-State Security Committee.

#### 3.3.3.5. The Secretariat

The Secretariat is the full-time executive organ of the Community (Article 66 of EAC Treaty). It is the counterpart of the EU Commission, although the latter is far more developed institution than the EAC Secretariat. The Secretariat is comprised of the offices of the Secretary General and Deputy Secretaries-General of the Community, the Counsel for the community and other officers. The Secretary General serves a fixed five-years term and is appointed by the Summit on a rotation basis (Article 67 EAC Treaty). In turn, the EU Commission is composed of the College of Commissioners which consists of one Commissioner per Member State. It has a president and a number of vice-presidents, one of which is the High Representative of the Union for Foreign Affairs and Security Policy.<sup>583</sup> The EU Commission functions as a collegiate body and it serves a five-years term of office.

The EAC Secretariat is in charge of the executive management of the community and ensures that decisions adopted by the Summit and the Council are properly implemented.<sup>584</sup> It also

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<sup>582</sup> Cuyvers, A. (2017). *Op.Cit.*, p.91.

<sup>583</sup> Articles 17 and 18 TEU

<sup>584</sup> See Article 71 of EAC Treaty.

oversees the operations of the autonomous institutions of the EAC which include: Lake Victoria Basin Commission; Civil Aviation Safety and Security Oversight Agency; Lake Victoria Fisheries Organisation; Inter-University Council for East Africa; and the East African Development Bank.<sup>585</sup> The EU Commission has a larger mandate that includes administrative, legislative, quasi – judicial and enforcement powers. E.g. it has the exclusive right of legislative initiative in most areas except the Common Foreign and Security Policy.<sup>586</sup>

### *3.3.3.6. The East African Court of Justice*

The EACJ is the judicial arm of the Community (Article 23 EAC Treaty).<sup>587</sup> The Court became operational on 30<sup>th</sup> November 2001 and heard its first case in 2005.<sup>588</sup> It is the counterpart of the ECJ, entitled the ‘Court of Justice of the European Union’ which is the judicial body of the EU. The ECJ has been part of the institutional set-up of the EU from the start.<sup>589</sup> The EACJ consists of a First Instance Division and an Appellate Division while the ECJ consists of two courts, the higher court also called the ‘Court of Justice of the EU’ and the lower court previously entitled the ‘Court of First Instance’ and now called the ‘General Court’. Judges of the EACJ are appointed by the Summit among qualified sitting judges of national courts of adjudication or from recognised jurists, on recommendation of the Partner States on the basis of two judges for the First Division or one judge for the Appellate Division (Article 24(1) EAC Treaty). The ECJ higher court consists of one judge per Member State and eleven Advocates-General who provide legal opinions to assist the Court in its work.<sup>590</sup> The General court too consisted of one judge per Member State but was enlarged, in 2016, to two judges per Member State.<sup>591</sup> Judges and Advocates-General are appointed by common accord of the governments of the Member States, after each member State nominates its own candidate.<sup>592</sup>

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<sup>585</sup> Mwaniki, M. (2010). *Op.Cit.*, p.269.

<sup>586</sup> Article 17(2) TFEU

<sup>587</sup> See Onyango, J.O. (2015). “Human Rights and Public Interest Litigation in east Africa: A bird’s eye view”. *The George Washington International Law Review*. 47, p.801.

<sup>588</sup> Open Society Justice Initiative (2013). Fact Sheet. East African Court of Justice, at [www.opensocietyfoundations.org/sites/default/files/fact-sheet-east-african-court-justice-20130627.pdf](http://www.opensocietyfoundations.org/sites/default/files/fact-sheet-east-african-court-justice-20130627.pdf), accessed on 18 July 2018.

<sup>589</sup> Cuyvers, A. (2017). *Op.Cit.*, p.97.

<sup>590</sup> Cuyvers, A. (2017). *Op.Cit.*, p.98.

<sup>591</sup> *Ibid.*

<sup>592</sup> Articles 253 and 354 TFEU.

The court's basic role is to ensure adherence to the law in the interpretation and application of and compliance with the Treaty (Article 23 EAC Treaty). It has jurisdiction to hear and determine disputes between the Partner States on the interpretation and application of the Treaty and between the Community and its employees (Articles 27(1), 31 EAC Treaty). The power to refer a case for determination by the Court on the ground of violation of obligations under the Treaty or infringement of the provisions of the Treaty is concurrently vested in the Partner States, the Secretary General and any resident in a Partner State (Articles 28, 29, 30 EAC Treaty). The general function of the ECJ is to ensure that EU law is observed throughout the EU in the interpretation and application of the treaties. The ECJ higher court deals with cases between the institutions and cases between Member States, including infringements.<sup>593</sup> It also deals with preliminary references from national courts.<sup>594</sup> The General Court hears all actions by individuals and companies.<sup>595</sup> The TEU allows for specialized courts to be set up, e.g. in the field of intellectual property.<sup>596</sup> The EAC Treaty provides instead for a possible future extension of the Court's jurisdiction with respect to original, appellate, human rights and other jurisdictions as the Council will determine and upon conclusion of a protocol to operationalise the new jurisdiction.<sup>597</sup> In 2015, the Court's jurisdiction was extended to cover trade and commercial disputes and disputes arising out of implementation of the protocol on the Establishment of the EAMU.

While the Court has not yet been conferred a human rights jurisdiction, it had been able to affirm its jurisdiction over matters of human rights as a fundamental principle of the Community. In *James Katabazi v. Secretary General*, the First Instance Division of the Court held that while it does not have jurisdiction over human rights violations *per se*, it may still consider cases with regard to interpretation of the Treaty, which includes 'respect of the rule of law: "*While the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27 (1) merely because the Reference includes allegation of human rights violation*".<sup>598</sup> A parallel can be established here between the

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<sup>593</sup> See Articles 258, 259, 260, 263, and 265 TFEU.

<sup>594</sup> Article 267 TFEU

<sup>595</sup> See Articles 263, 265 and 340 TFEU.

<sup>596</sup> Article 19(1) TEU.

<sup>597</sup> Article 27(2) EAC Treaty.

<sup>598</sup> [2007] 1 (EACJ).

*Katabazi* case and case 11/70 *Internationale Handelsgesellschaft* that was instrumental in the evolution of fundamental rights protection in the EU. In spite of lacking textual basis in the original treaties,<sup>599</sup> the ECJ in this case declared the supremacy of Community law in relation to the member states' constitutions and stated that 'respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice'.<sup>600</sup> It further stated that 'the protection of such rights, whilst inspired by the constitutional traditions common to the member states, must be ensured within the framework of the structure and objectives of the Community'.<sup>601</sup> In *Attorney General of Rwanda v. Plaxeda Rugumba*, too, the Appeal Chamber held that although the EACJ does not have jurisdiction to adjudicate disputes concerning human rights *per se*, article 6(d) of the Treaty and Article 6 of the African Charter allow the Court to assert jurisdiction over the claim.<sup>602</sup> Hence, East African legal and natural persons have been referring cases to the Court on the basis of violation of fundamental principles of the Community set out in Article 6 as good governance including democracy, rule of law, accountability, social justice, equal opportunities, gender equality, as well as human and peoples' rights. A protocol for the extension of its human rights and other jurisdictions is currently under consideration.<sup>603</sup>

The EACJ does not require that applicants exhaust domestic remedies before applying to the Court.<sup>604</sup> The Court primarily issues declarations as to whether particular act or legislation infringes rights or provisions of the Treaty.<sup>605</sup> It occasionally also recommends specific amendments to legislation to bring it in conformity with the Treaty.<sup>606</sup> In *Burundian Journalists Union v. The Attorney General of the Republic of Burundi*, the Court ruled that a number of Burundi's Press Law N<sup>o</sup>.1/11 provisions were in violation of principles enshrined in Articles 6(d)

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<sup>599</sup> von Danwitz, T. (2001). "The charter of fundamental rights of the european union between political symbolism and legal realism". *Denver Journal of International Law and Policy*, 29(4), p.293.

<sup>600</sup> ECJ, Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125, para. 4.

<sup>601</sup> *Ibid.*

<sup>602</sup> [2010] 8 (EACJ).

<sup>603</sup> Possi, A. (2015). "Striking a balance between community norms and human rights: The continuing struggle of the East African Court of Justice". *African Human Rights Law Journal* 15, p.210-211.

<sup>604</sup> von Staden, A. (2016). "Subsidiarity, exhaustion of domestic remedies, and the margin of appreciation in the human rights jurisprudence of African sub-regional courts". *The International Journal of Human Rights* 20(8), p.1122.

<sup>605</sup> Open Society Justice Initiative (2013). *Op.Cit.*

<sup>606</sup> *Ibid.*

and 7(2) EAC Treaty; the Court urged Burundi to comply with the judgment.<sup>607</sup>

EACJ's judgments are binding. Article 38(3) EAC Treaty requires the Partner States to take immediately measures necessary to implement a judgment of the Court. However, the EACJ does not have judgment enforcement mechanisms of its own.<sup>608</sup> It, thus, lacks legal rights to impose compliance with its judgments. In *Burundian Journalists Union v. The Attorney General of Burundi*, referred to above, the Court stated that it finds and holds that it has no jurisdiction to give any orders to a government.<sup>609</sup> Implementation of the judgments of the Court depends on the political will of the Partner States. The Court's legal system would, therefore, better be characterised as inter-governmental, not supranational as often referred to. On the other hand, the ECJ is a truly supranational body.<sup>610</sup> While it has compulsory jurisdiction over all EU law, except the Common Foreign and Security Policy and other smaller limitations, it has the final say on the interpretation and application of EU law and all national and EU bodies are bound by the interpretation.<sup>611</sup>

#### 3.3.3.7. The East African Legislative Assembly (EALA)

The EALA is the legislative arm of the Community and is, as such, responsible for the legislative process. It is the counterpart of the European Parliament. The functions of the EALA are provided under Article 49 EAC Treaty and include legislative powers, investigative or supervisory, representation and budget oversight. Its main function is to legislate on aspects of East African cooperation. The EALA oversees all matters that fall within the Community's work and its functions include debating and approving the budget of the Community, making recommendations to the Council, and liaising with National Assemblies on matters pertaining to the Community. Of all African regional Parliaments and in the world more generally, the EALA is the only regional parliamentary body with the power to initiate legislation.<sup>612</sup> Article 59(1) EAC

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<sup>607</sup> [2013] 7 (EACJ).

<sup>608</sup> See Ebobrah, S.T. (2009). "Human Rights developments in sub-regional courts in Africa during 2008". *African Human Rights Law Journal* 9, p.317.

<sup>609</sup> *Ibid.*

<sup>610</sup> Cuyvers, A. (2017). *Op.Cit.*, p.98.

<sup>611</sup> *Ibid.*

<sup>612</sup> Gastorn, K. (2015). "The Inevitable Reforms of the Legislative Competencies of the East African Legislative Assembly". *Verfassung Und Recht in Übersee VRU* 48, p.29.



Treaty allows any member of the EALA to propose any motion or introduce any bill in the House. Rule 64 of the EALA Rules of Procedure of 2001 too provides that every committee of the House, within its area of competence, and every member of EALA has a right to move a private members' bill. From its inauguration on 30 November 2001 to date, EALA has passed over 47 legislations, the majority of which originated from private members' bills.<sup>613</sup>

The power of the EALA to initiate legislation for the EAC is shared with the Council of Ministers whose decisions, regulations and directives made in pursuant of the provisions of the EAC Treaty are binding on the Partner States and on all organs and institutions of the Community except the Summit, the Court and the EALA within their jurisdictions. Additionally, the Council's regulations, directives and decisions are equal to EALA laws. Kennedy Gastorn points out the tension existing in the shared law-making power between EALA as a legislative organ and the Council as a policy organ, which consequence is the passing of bills by EALA on matters under negotiation, opposed or agreed upon by the Council, hence reopening concluded negotiations as well as legislating on matters outside the scope of the Treaty.<sup>614</sup>

Like the EALA, the European Parliament's primary functions concern legislation, the budget, and political control.<sup>615</sup> However, the European Parliament does not have the right of initiative although it can ask the Commission to submit a legislative proposal,<sup>616</sup> in which case the Commission is obliged to act upon the request but this is not a formal right to initiate legislation.<sup>617</sup> Only the European Commission, and in a few cases the Council, can initiate legislation.<sup>618</sup> Consequently, the legislative power of the European Parliament consists in amending and adopting proposals.<sup>619</sup> Depending on the legal basis underlying the proposed legislation, about three procedures apply to the legislative power of the European Parliament, namely the 'ordinary legislative procedure' (known before Lisbon as the 'co-decision' procedure),

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<sup>613</sup> *Ibid.*, 34

<sup>614</sup> Gastorn, K. (2015). *Op.Cit.*, p.29 & 38.

<sup>615</sup> Article 14 TEU.

<sup>616</sup> Article 225 TFEU.

<sup>617</sup> Kohler, M. (2014). "European Governance and the European Parliament: From Talking Shop to Legislative Powerhouse". *JCMS* 52(3), p.603.

<sup>618</sup> Cuyvers, A. (2017). *Op.Cit.*, p.81.

<sup>619</sup> *Ibid.*

the ‘consent procedure’, and the ‘consultation procedure’.<sup>620</sup> The ordinary legislative procedure is the ‘normal’ or default mode to pass legislation. It is regulated by Article 294 TFEU. Under this procedure, the European Parliament is co-legislator, can veto legislation and propose amendments but the adoption of a legislative proposal must be approved by the Council of Ministers.<sup>621</sup> Under the consent procedure, the Council formally adopts an act, but the European Parliament is requested to give its consent in certain legislative areas, as a special legislative procedure under Article 289(2) TFEU. The consultation procedure too is a special procedure under Article 289 TFEU and an exception to the ordinary legislative procedure. It requires the Council to consult the European Parliament.<sup>622</sup> However, the Council is not actually bound by the Parliament’s opinion. This procedure is applicable in a limited number of policy areas.<sup>623</sup>

Laws enacted by EALA are binding on the EAC Partner States and directly enforceable. They take precedence over all laws of the Partner States on similar matters pertaining to the implementation of the EAC Treaty, except national Constitutions.<sup>624</sup> However, EALA’s power to make laws as a regional parliament is seriously constrained by two facts. On the one hand, it can only put forward and vote on motions and bills if they have no cost implications to any fund of the Community.<sup>625</sup> Similarly, Article 59(1) EAC Treaty bars any motion that does not relate to the functions of the Community and any bill that does not relate to a matter to which acts of the Community may be enacted. On the other hand, the Heads of state of the Partner States must collectively assent to the motions and bills otherwise they lapse if a Head of State withholds assent.<sup>626</sup> As a result, many private members’ bills passed by the EALA have not been operational for lack of assent by the Heads of state, including the EAC Human and Peoples Rights Bill passed on 25 April 2012, intending to establish an EAC human and peoples’ rights regime and give effect

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<sup>620</sup> Ibid., p.82. Also, see Erne, J. (2010). “Primary and secondary law-making in the renewed EU”. *Trames* 14(64/59), p.261-262.

<sup>621</sup> Cuyvers, A. (2017). *Op.Cit.*, p.82.

<sup>622</sup> Ibid.

<sup>623</sup> [https://eur-lex.europa.eu/summary/glossary/consultation\\_procedure.html](https://eur-lex.europa.eu/summary/glossary/consultation_procedure.html), accessed on 20<sup>th</sup> August 2019.

<sup>624</sup> Ibid., pp.34-35.

<sup>625</sup> Ogbonnaya U.M. and K. Ogujiuba (2015). “Regional Parliamentary Assemblies in Africa: Challenges of Legitimacy of Authority and Status of Operation. *The Journal of Legislative Studies*. 21(4), p.558.

<sup>626</sup> Ibid.

to the provisions of the Treaty on matters of human and peoples' rights.<sup>627</sup> Like the EACJ, EALA is not a supranational institution and it lacks mechanisms to enforce its decisions, despite the power to make binding laws on all Partner States.

Membership of the EALA consists of nine members per each Partner State. Their term of office is five years renewable once<sup>628</sup>, except ex-officio members who attend the Assembly by virtue of their official capacity and enjoy no security of tenure or term-limit. Ex-officio members of EALA do not participate fully in the legislative process as they have no voting right.<sup>629</sup> They include the Minister responsible for EAC affairs in each Partner State, the Assistant Minister for EAC affairs (who attends the meetings of EALA in the absence of the substantive Minister), the Secretary General of the EAC and the Counsel to the Community.<sup>630</sup> The term of office of Members of the European Parliament too is five years. Seats in the European Parliament are divided in accordance with the principle of degressive proportionality<sup>631</sup> that attributes a minimum of six and a maximum of ninety-six seats to each Member State.<sup>632</sup> Members of the European Parliament are elected by direct universal suffrage in national elections, unlike members of the EALA who are elected by their respective national parliaments.<sup>633</sup> In practice, political parties represented in the national parliaments of the EAC Partner States nominate eligible members for the EALA. Ogonnaya and Ogujiuba argue that the fact that members of EALA are not elected by direct universal suffrage undermines their legitimacy to make laws for the people of the region.<sup>634</sup> They also observe that none of other regional parliaments in Africa has its members elected by popular vote or direct universal suffrage.<sup>635</sup> While they acknowledge that the EALA is progressively evolving into a truly legislative organ of the EAC, in function and objective, compared to its counterparts in Africa with a more advisory power, they recommend an institutional and legal

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<sup>627</sup> Gastorn, K. (2015). *Op.Cit.*, p.39.

<sup>628</sup> Article 51(1) EAC Treaty.

<sup>629</sup> Article 58(2) EAC Treaty.

<sup>630</sup> Article 48(1) EAC Treaty.

<sup>631</sup> The principle means that smaller countries in the EU have fewer MEPs than bigger countries, but also that MEPs from larger countries represent more people than their counterparts from smaller countries.

<sup>632</sup> Article 14(2) TEU.

<sup>633</sup> Article 50(1) EAC Treaty.

<sup>634</sup> Ogonnaya U.M. and K. Ogujiuba (2015). *Op.Cit.*, pp.558 & 570.

<sup>635</sup> *Ibid.*, p.565.

reform of membership of African regional parliaments towards a popular and direct universal election system, to enable the latter to contribute meaningfully to regional socio-economic and political integration.<sup>636</sup> Indeed, EALA members need to be elected directly by the citizens of the Community if the principles enshrined in the EAC Treaty, such as good governance and people-centered cooperation as well as the independence recognised to the Parliament should bear a real meaning.

#### 3.3.4. Pillars of the EAC

The EAC adopted a linear integration process similar to that of the EU. It is an economic cooperation organisation that seeks to increase economic growth and sustainable development through trade and investment among the Partner States. The proposed sequence of the EAC integration includes a Customs Union as the entry point, a common market, a monetary union and ultimately a political federation.<sup>637</sup> These four stages constitute the pillars of the Community's integration strategy.

##### 3.3.4.1. The Customs Union

Article 75 EAC Treaty provides for the conclusion of the protocol on the establishment of the Customs Union. The Protocol establishing the EAC Customs Union was adopted on 2<sup>nd</sup> March 2004. It aims at liberalising trade among the Partner States and establishing free trade within the Community, with regard to goods originating from the Partner States. Accordingly, the Customs Union requires the Partner States to remove all tariff barriers to trade among them, including all duties, as well as non-tariff barriers and quantitative restrictions and prohibitions on trade in goods, except as provided for by the Protocol.<sup>638</sup>

In addition to liberalisation of trade among the Partner States and consecutive removal of tariffs and non-tariff barriers, the Customs Union Protocol establishes a CET for all goods imported in the Community, therefore establishing a single customs territory. The adopted CET provides a three band tariff as follows: 0% for meritorious, raw materials and capital goods; 10% for intermediate goods; and 25% for consumer or finished goods.<sup>639</sup> The application of a CET

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<sup>636</sup> *Ibid.*, p.569 - 570.

<sup>637</sup> Article 2 and Article 5(2) EAC Treaty.

<sup>638</sup> Article 13 EAC Customs Union Protocol.

<sup>639</sup> Article 12 EAC Customs Union Protocol.

constitutes an exception to the GATT's generalised Most Favoured Nations clause, an ancient technique that requires parties to a trade agreement to extend *ipso facto* to all the initial parties, without there being any negotiations, any additional advantage from any new agreement they may contract with a third party.<sup>640</sup> The CET implies that the Partner States are expected to levy the same tariff rates for imports from non-member states and the same preferential tariff rates on imports from non-member states with which they have a special trade agreement.<sup>641</sup> In practice, however, it is not possible for states to belong to two different customs unions applying different CETs without what a joint report of the World Bank and the EAC calls a perforation of the CET.<sup>642</sup> The EAC, like other African RECs, is characterised by a multi-membership of the constituent states. This is to say that members belong to more than one REC. In the EAC, Burundi, Kenya, Rwanda and Uganda are also members of the COMESA. Tanzania is a member of the SADC. Burundi and Rwanda also belong to the ECCAS. A perforation of the CET affects the free movement of goods in a customs union as goods imported under a different CET may not be allowed to freely circulate across the borders of the members, unless the CETs are similar. In order to remedy to this conflicting situation, the Customs Union Protocol and other related regulations allow EAC Partner States to uphold tariff preferences granted to third countries as a temporary exception of the CET, provided such preferences had been agreed upon before the ratification of the EAC Customs Union Protocol.<sup>643</sup>

The EAC Customs Union has still not been fully operational. In addition to persisting NTBs, it has been reported that the Partner States have in some cases introduced new explicitly protectionist NTBs, though the majority of them meet an agreed regulatory objective, such as food and product safety.<sup>644</sup>

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<sup>640</sup> Matambalya, F.A.S.T. (2011). *Building the East African Common market: Opportunities, Concerns, and Options*. CSAE Conference Discussion Paper ID-468, p.10.

<sup>641</sup> Taguaba, L. (1978).161

<sup>642</sup> World Bank. East African Community Secretariat (2014). *EAC Common Market Scorecard: Tracking EAC Compliance in Movement of Capital, Services and Goods*, p.29, 30.

<sup>643</sup> Michael Stahl and H. Tariff (2005). *Liberalisation Impacts of the Customs Union in Perspective*. Tralac Working Paper 4/2005, p.4.

<sup>644</sup> Society for International Development (2012). *Op.Cit.*, p.49

Another challenge that slows down the EAC Customs Union is the fact that a revenue sharing mechanism has not yet been agreed by the Partner States.<sup>645</sup> The formation of a customs union requires members to agree on modalities for sharing tariff revenue. The EAC Treaty itself affirms that the benefits of the integration shall be equitably shared.<sup>646</sup> Matambalya advances that there should be mechanisms to ensure equitable sharing of the costs of integration among members of a customs union and that in the absence of such mechanisms the same countries which reap the highest benefits of integration will also bear the smallest burden.<sup>647</sup> One of the reasons for the collapse of earlier integration efforts, indeed of the EAC in 1977, was the perception of a disproportionate sharing of economic benefits accruing from the regional market and a lack of a formula to deal with the problem.<sup>648</sup> The current EAC, therefore, needs to address problems arising from the implementation of the Treaty, including the Customs Union (and the Common Market).

The establishment of the customs union in 2005 was intended to progress over a period of five years, with a fully-fledged customs union in place in 2010. The goal has not been fully achieved as the EAC Customs Union has not been complete. Holmes and Rollo cautiously argue that the EAC is not yet a Customs Union in anything but name, reckoning that it took the EU 35 years to remove internal customs barriers.<sup>649</sup> The next phase in the EAC economic integration as defined by the EAC Treaty is a common market.

#### *3.3.4.2. The EAC Common Market.*

The establishment of the Common Market among the EAC Partner States is provided for by Article 76 of the EAC Treaty and defined in the Common Market Protocol signed on 30 November 1999 and entered into force in 2010. The Common Market Protocol (as well as the Treaty) introduced four freedoms as follows: the free movement of goods, of capital, of services, of persons and labour, the latter coupled with the right of establishment and residence.

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<sup>645</sup> Cirera, X. (2013). *Regional Integration in EAC Countries: Lessons and the Way Forward*. Trade Mark East Africa, p.5 & 10. Also, Trade Mark East Africa (2013). Making regional integration in the EAC work. Policy Brief. Accessed at [www.trademarka.com/resource-center/publications/page/6/](http://www.trademarka.com/resource-center/publications/page/6/), on 25 June 2017.

<sup>646</sup> Article 5(2) EAC Treaty.

<sup>647</sup> Matambalya, F.A.S.T. (2012). *Op.Cit.*, p.223.

<sup>648</sup> Kamala B., D. (2006). *Op.Cit.*, p.13.

<sup>649</sup> Holmes, P. and J. Rollo. (2012). *Op.Cit.*, p.20.

The free movement of persons who are citizens of the Partner States is provided for under Article 7 of the Common Market Protocol. It includes the freedom to move within, stay in and exit the territory of the Partner States without any restrictions. Under the Common Market Protocol, East African citizens are eligible to enter the territories of the Partner States without a visa, subject to the use of a valid common standard travel document. In order to ease the movement of citizens across the borders, the EAC launched a biometric passport at the 17<sup>th</sup> Ordinary Summit of the Heads of state on 2<sup>nd</sup> March 2016.<sup>650</sup> The 35<sup>th</sup> meeting of EAC Council of Ministers of 30<sup>th</sup> March-4<sup>th</sup> April 2017 directed the Partner States to start issuing the new EAC passport by 31<sup>st</sup> December 2018.<sup>651</sup>

#### *3.3.4.3. The East African Community Monetary Union*

The EAMU was established on 30<sup>th</sup> November 2013 and is currently being implemented. It aims at promoting and maintaining monetary and financial stability.<sup>652</sup> The EAMU Protocol envisages the adoption of a single currency and thus the constitution of a single currency area.<sup>653</sup> The Protocol subjects the adoption of the single currency by at least three Partner States that fulfil, amongst other requirements, full implementation of the customs union and common market, and the attainment and maintenance of macroeconomic convergence.<sup>654</sup> The adoption of a single currency will realistically take a long time due to the unfinished implementation of the customs union and common market.

#### *3.3.4.5. Political federation*

Political federation constitutes the last stage in the integration plan of the EAC and is defined as the ultimate objective of the Community. It is a political system in which two or more states come together to form a super-state under a single political authority. The EAC Treaty does not assert the establishment of a political federation with the same vigour as for the preceding three economic pillars. Article 123 EAC Treaty refers to 'the eventual establishment of a Political Federation of the Partner States'. While this may be interpreted as reducing or affecting the

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<sup>650</sup> Joint Communiqué of the 17th Ordinary Summit of the Heads of state, item 17.

<sup>651</sup> <http://www.eac.int/news-and-media/press-releases/20170407/eac-start-issuing-ea-e-passport-january-2018>, consulted on 4<sup>th</sup> July 2017.

<sup>652</sup> Article 3 EAC Monetary Union Protocol.

<sup>653</sup> Article 18 EAC Monetary Union Protocol.

<sup>654</sup> *Ibid.*

political will necessary to the attainment of political federation, it may also be understood as reinforcing the Treaty's preservation of national sovereignty of the Partner States observed through, for instance, the lack of enforcement mechanisms for the decisions made by the institutions of the Community. Moreover, the Treaty is not specific about the type or model of political federation envisaged by the EAC. A model, Structure and Action Plan for the East African political Federation, as well as a Constitution, are currently under discussion by the Summit of the Heads of States.<sup>655</sup>

The envisaged political federation in the EAC is built on three main foundations and the commitment of the Partner States to establish specific frameworks for cooperation in those spheres. Firstly, the Partner States commit to adopt common foreign and security policies (Article 123 EAC Treaty). Secondly, they agree to adopt common mechanisms in matters relating to peace and security, specifically disaster and refugees' management, cross-border crimes, drug trafficking and terrorism (Article 124 EAC Treaty). Lastly, the Partner States commit to cooperate and establish a framework in defence affairs (Article 125 EAC Treaty). So far, the EAC Partner States have adopted a number of protocols under the scope of political federation, including the Protocol on Foreign Policy Coordination, the Protocol on Peace and Security, the Protocol on Defence, and the Protocol on Combating Drug Trafficking in the East African Region. However, the EAC is confronting to a challenge with ratification of some of these instruments. The EAC Partner States are largely dualist systems regarding the relationship between their national laws and international law including regional laws.<sup>656</sup> According to article 151(4) EAC Treaty, Protocols are integral parts of the Treaty. Article 8(2) EAC Treaty provides for domestication of the Treaty, thus implicitly extending the same requirement to protocols. The domestication process has been halting the full implementation of the protocols. For instance, the Protocol on Peace and

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<sup>655</sup> See Kaahwa, W.T.K. (2017). "The Institutional Framework of the EAC". In: Ugirashebuja, E., Ruhangisa, J.E., Ottervanger, T. and A. Cuyvers (Eds). *East African Community Law*. Brill Nijhoff. Leiden, p.62. Also, Anami, L. "Experts suggest models for EAC political union". The Standard (27<sup>th</sup> November 2012), at <https://www.standardmedia.co.ke/article/2000071581/experts-suggest-models-for-eac-political-union> , accessed on 12 May 2017. Also, Ligami, C. "Three countries renew push for EAC political federation by 2016". The East African (14<sup>th</sup> March 2015), at <https://www.theeastafrican.co.ke/news/Three-countries-renew-push-for-EAC-political-federation-by-2016/-/2558/2653442/-/c8bog9/-/index.html>, accessed on 10 April 2015.

<sup>656</sup> Ruhangisa, J.E. (2017). "The Scope, Nature and Effect of EAC Law". In: Ugirashebuja, E., Ruhangisa, J.E., Ottervanger, T. and A. Cuyvers (Eds). *East African Community Law*. Brill Nijhoff. Leiden, p.149.



Security, signed in 2013 after more than four years of negotiations, has still not been ratified by all Partner States. As of April 2017, it was reported that only Rwanda and Uganda have ratified it and that at least two Partner States have not yet done so, South Sudan being presumably one of them.<sup>657</sup> The lack of collective ratification slows down the entry into force and the full implementation of the Protocol on Foreign Policy Coordination too, since its conclusion in 2010.<sup>658</sup> While the Partner States negotiate instruments and reach an agreement on regulatory frameworks often after difficult and lengthy negotiation processes, it seems absurd that they do not ratify them on time. This has raised a concern and a lot of criticisms about the Partner States' political will and commitment towards the whole process of integration in the EAC. Their lack of political will is often explained by the fear by political leaders of a loss of national sovereignty and a concern that the Partner States would basically be relegated to powerless subjects of the Community.<sup>659</sup> In this regard, Ruhangisa Eudes advances the view that the Partner States maintain a considerable degree of sovereignty, despite the expression of their desire for ceding some of their sovereignty to a supranational EAC.<sup>660</sup> He further argues that the Partner States are not wholly ready to cede a substantive part of their sovereignty.<sup>661</sup> Nevertheless, the Partner States have relinquished some, though not significant, sovereignty to the EAC, at least in the identified areas of cooperation. The signing of protocols in the framework of political federation, the removal of barriers to trade and the establishment of a CET in the Customs union, the provision of freedom of movement of people, goods and factors of production in the Common Market, and harmonization of laws and convergence of policies are all the expression of the multilevel process of regionalization that fills the EAC with institutional and political ties, political trust, interdependence, and increased homogeneity.

The Treaty places people at the centre of integration effort in the EAC. The first operational principle of the Community as outlined in Article 7 EAC Treaty reads 'people-centered and

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<sup>657</sup> Karuhanga, J. Regional MPs weigh in on ratification of EAC Peace and Security Protocol. *The New Times*. April 5, 2017, at <https://www.newtimes.co.rw/section/read/210169> , accessed on 10<sup>th</sup> May 2017.

<sup>658</sup> See, Society for International Development. The State of East Africa Report Series. *Legal Status of Laws*, at [www.inequalities.sidint.net/soear/intergration-tracker/legal-status-of-laws](http://www.inequalities.sidint.net/soear/intergration-tracker/legal-status-of-laws), accessed on 15 May 2017.

<sup>659</sup> See Kamala B.D. (2006). *Op.Cit.*, p.14.

<sup>660</sup> Ruhangisa, J.E. (2017). *Op.Cit.*, p.146.

<sup>661</sup> *Ibid.*, p.160.

market-driven cooperation'. As argued in the theoretical chapter, a successful regional project presupposes linkages between states and non-state actors. Contrary to the defunct EAC and other older regional schemes in Africa that stressed formal structures and inter-governmental actions to the exclusion of non-state actors and informal linkages and processes of interaction, the current EAC is typically an expression of the new regionalism that came up as a response to globalisation, especially the challenges posed by transnational actors and challenges to the nation state, such as financial crises, migration, environmental degradation, transnational crime, etc.<sup>662</sup> Morten Bøås acknowledges the recognition by the current EAC of the grass-root people, *wananchi*, small-scale traders, people on the ground who use informal routes and networks for their goods and services across the borders and who actually stand to benefit most from the opening of borders<sup>663</sup>. Koroma *et al.* argue that a discussion of regional integration and trade in Africa will be incomplete without examining the relevance of informal or sometimes also referred to as illegal cross-border trade.<sup>664</sup> In East Africa, it accounts for over fifty percent of intra-regional trade, particularly agricultural products.<sup>665</sup> Informal cross-border trade constitutes what is sometimes called shadow regionalism or informal regionalism in Africa, as opposed to state-directed market driven regionalism. It consists of informal networks often involved in illegal transactions across borders, including organised crime, drug dealers, terrorism groups, clan leaders and warlords.<sup>666</sup> Accordingly, Bøås calls for the need to grasp the dynamics of informal regionalism, firstly by adopting a dynamic understanding of the region as a social construct and not just a geographical understanding of the region or formal political and economic cooperation; secondly, by studying informal regionalism from below and accounting for the networks involved, including smuggling and crime.<sup>667</sup>

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<sup>662</sup> See Acharya A., (2012). "Comparative regionalism: A field whose time has come?" *The International Spectator*, 47(1), p.8.

<sup>663</sup> Bøås, M. (2001). "Regions and regionalisation: A heretic's view". In: *Regionalism and Regional Integration in Africa. A Debate of Current Aspects and Issues*. Discussion Paper 11. Nordiska Afrika institutet. Uppsala, p.36.

<sup>664</sup> Koroma, S. Mosoti, V. et. al. (2008) "Towards an African common market for agricultural products". *FAO Review of Agricultural Commodity Policies* 2, p.22.

<sup>665</sup> Society for International Development (2012). *Op.Cit.*, p.48.

<sup>666</sup> Vayrynen, R. (2003). "Regionalism: Old and New". *International Studies Review*. 5, p.42.

<sup>667</sup> Bøås, M. (2001). *Op.Cit.*, p.37.

### Conclusion

The EAC has been criticised for being overambitious and for speeding up the integration process before progressively completing each of the stages of integration, the last, political integration, having been a subject of a fast-tracking mechanism initiated by the Summit of the Heads of State since 2004. Whereas fast-tracking political integration is commendable from the point of view of the academic debate, it has been argued that political integration should come first or drive economic integration, or at least both pursued at same time. Also, the EAC multi-pronged approach to integration, though appreciated, is often said to be rigid and to lack sufficient space for careful sequencing that a regional integration scheme needs to maximise the benefits.

As a multidimensional regional cooperation institution that goes beyond trade to include social, cultural and political integration, the study of the EAC must take into consideration bottom-up and informal processes that engage in illegal transactions across the borders. Particularly, the debate over the merits and demerits of regional integration refers to the possibility of increased transnational organised crime as a direct consequence of the removal of borders and free movement of people inherent to regional integration schemes. It is precisely the nature and magnitude of organised crime in the EAC that the next chapter addresses.

#### 4. THE PROBLEM OF TRANSNATIONAL CRIME IN EAST AFRICA

##### Introduction

This chapter examines the status of transnational crime in East Africa. It argues that transnational crime phenomenon in East Africa is on the rise. The crimes considered in the chapter are not exhaustive but constitute, arguably, a representative sample of transnational criminal activity in the East African region.

The main research that informs the chapter consists of the EAC commissioned “Study to assess transnational organised crime and terrorism in the EAC region” (2015) and three reports published by the UNODC in 2009, 2011 and 2013. Reports made by The Sentry (2015, 2016, 2017) too contributed significantly in the chapter but in relation to money laundering only. This thesis could not collect data on transnational crimes directly from the Partner States for two reasons. Firstly, it was costly and not practical to travel to all the EAC Partner States for collecting the data. Secondly, accessing countries data on transnational organised crimes is generally considered difficult because sometimes they are treated as confidential and they are often scattered. The viable option for the thesis was relying on reports made by credible international organisations and specialized agencies like the UNODC. The reliability of the data collected by the organisations is arguable. Nevertheless, the thesis gives credit to the data based on the methods used in their collection. The “Study to assess transnational organised crime and terrorism in the EAC region” (2015), e.g., analysed national crime reports (on registered cases and court cases) and statistics from the police and relevant government departments in some Partner States.<sup>668</sup> It also analysed written briefs, existing documents and media reports.<sup>669</sup> It conducted interviews too with key stake holders at national police, Interpol national and regional bureaus, prosecution and government departments.<sup>670</sup> The UNODC study on “Organised Crime and trafficking in Eastern Africa” (2009) is based on UNDOC data, secondary information, interviews with representatives of government institutions, international organisations and NGOs.<sup>671</sup> The two other UNODC

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<sup>668</sup> EAC (2015). *Study to assess transnational organised crime and terrorism in the EAC region*, p.8-11, 18, 25, 41.

<sup>669</sup> *Ibid.*, p.3.

<sup>670</sup> *Ibid.*, p.3, 7, 10, 10-16.

<sup>671</sup> UNODC (2009). *Organised Crime and Trafficking in Eastern Africa*, p.7

studies provide no more information than data and information were reported by governments to UNODC and other international organisations. The Sentry report “War Crime Shouldn’t Pay” (2016) states it conducted interviews with experts and eyewitnesses and reviewed corporate findings, legal records, financial data and correspondence, and analysed UN and other official documents, and international and local news accounts.<sup>672</sup> With such limited and fragmented quantitative data, the chapter’s aim is not to provide a full account of transnational organised crimes in the EAC, rather to establish their existence and magnitude.

The first section of the chapter lays down the context of the emergence of transnational crime globally. The second section defines transnational crime and presents its characteristics and distinctiveness from other crimes. The third section discusses the particular context of East Africa as a growing illicit market and the reasons for such situation. The fourth section discusses the operational modes of the criminal networks involved in transnational crime in East Africa. The last section presents the extent of selected transnational crimes in East Africa.

#### 4.1. A historical account

The study of transnational crime as such is relatively recent. The term is considered to have entered the vocabulary of criminology after the introduction of the concept of transnational actors by International Relations in the 1970s.<sup>673</sup> The concept of transnational crime is considered to have been coined at the 5th UN Congress on crime prevention in 1975.<sup>674</sup> However, early manifestations of transnational crime are referred to with regard to deliberate illegal trade between Britain and Spain’s colonies in South America, in the first half of the 18th century, as well as the introduction, by Britain, of an opium market in China by the 19th century, despite the restrictions of opium in Britain itself.<sup>675</sup>

Serious concerns over transnational crime arose in the 1980s.<sup>676</sup> Transnational crime was then expanding to broader criminal activities. This expansion of transnational crime is explained by a

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<sup>672</sup> The Sentry (2016). *War Crimes Shouldn’t Pay*, p.4.

<sup>673</sup> Felsen, D. and A. Kalaitzidis (2005). “A Historical overview of Transnational Crime” In: Reichel, P. (Ed.) (2005). *Handbook of Transnational Crime and Justice*. Sage Publications. London, p.4.

<sup>674</sup> *Ibid.*, p.5.

<sup>675</sup> *Ibid.*, p.10.

<sup>676</sup> Encyclopedia of Crime and Justice (2016). *Organised Crime*, p.6.

series of transformations that the world order was undergoing, precisely technology advances in transport and communication, and globalisation.<sup>677</sup>

Technological advances have increased the mobility of people and goods across the borders of countries and facilitated communication among people across the planet as well as transactions and the transfer of funds. The development of transport has reduced the cost of travel and has resulted in a greater mobility of people, including criminals. As a result, illicit market has expanded and illegal trade and illicit trafficking in prohibited goods have flourished. The reduction of costs of transportation and communication has brought interdependence, interconnection and a closer integration of countries which, in essence, is what globalisation means, a borderless world where flows of ideas, people, transactions, cultures, values, norms and crimes increasingly move across the borders with less restrictions.<sup>678</sup>

If globalisation is generally perceived as positive for fostering human rights especially those of women and children, and bringing a greater awareness of global challenges such as environment protection, global warming, infectious diseases including HIV, Ebola, it is also said to produce negative consequences, of which the growth and expansion of transnational crime such as terrorism, trafficking in people and drugs, migrant smuggling, money laundering, and corruption.<sup>679</sup> In this era of increased globalisation in which the world is often described as a global village, states have become less powerful while transnational actors have greatly emerged and established themselves as key subjects of the international system. This process is facilitated by regionalism, an intermediate step to globalisation, and associated liberalisation of the market, the establishment of common markets, of freedom of movement of goods, people and capital, and the removal of borders between countries. Criminal gangs take advantage of fast transactions and transfer of fund eased by new technology, the ease of transport and movement, as well as the weakening and failure of states, and loopholes in national legal systems, to establish illegal business or, sometimes, front legal business alongside illegal activities.<sup>680</sup>

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<sup>677</sup> *Ibid.*

<sup>678</sup> Viano, E.C. (2010). "Globalisation, Transnational Crime and State Power: The Need for a New Criminology". *Rivista di Criminologia, Vittimologia e Sicurezza* III (3), p.64.

<sup>679</sup> *Ibid.*, p.65-67.

<sup>680</sup> *Ibid.*, p.68-79.

The late 1980s witnessed major events that were of critical importance for the development of transnational crimes. First, was the end of the Cold War, the fall of the Berlin Wall and the disintegration of the Soviet Union which opened Eastern Europe to the West and prompted the creation of many new states.<sup>681</sup> This new development signalled the apparent triumph of democracy over totalitarianism and was hailed as the victory of capitalism over socialism. It was highly significant in global politics and restructured the international system, putting an end to the traditional divide between the East and the West. However, the newly created states were often weak and unstable.<sup>682</sup> Their subsequent collapse and the outbreak of the Balkan war at the beginning of the last decade of the twentieth century prompted illegal migration of East Europeans to West and Central Europe. The collapse of the Soviet Union also meant that thousands of skilled workers left unemployed constituted a resource for organised crime including surveillance, forging documents, smuggling, banking and financial crime, and violence, giving criminal gangs profitable criminal activities such as trafficking women for the sex trade, smuggling cigarettes and other goods, and trafficking drugs.<sup>683</sup>

#### 4.2. Understanding transnational crime: Definition

There is no exact and agreed upon definition of 'transnational crime'.<sup>684</sup> The term 'transnational crime', as such, is not a legal concept but a framework under which a series of offences is analysed. In accordance with the UN Convention on Transnational Organized Crime of 2000, transnational crime is a form of organized crime although the latter does not exist as an ideal type but rather as a degree of criminal activity.<sup>685</sup> The Convention itself does not provide a definition of organized crime. Instead, organized crime is understood as a 'serious crime' committed by an 'organised criminal group'.<sup>686</sup> According to Article 2 of the Convention, 'organised criminal group' shall mean a structured group of two or more people committing serious crimes for profit or material benefit. The EU Council Framework Decision 2008/841/JHA

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<sup>681</sup> Felsen, D. and A. Kalaitzidis (2005). *Op.Cit.*, p.3.

<sup>682</sup> Marine, F.J. (1999). *The threats posed by transnational crimes and organised crime groups* Resource Material Series 54. UNAFEI, Tokyo, Japan, p.26.

<sup>683</sup> Viano, E.C. (2010). *Op.Cit.*, p.68.

<sup>684</sup> Felsen, D. and A. Kalaitzidis (2005). *Op.Cit.*, p.7 and 15.

<sup>685</sup> See Alemika Etannibi, E. O. (2013). "West Africa". In: Boll – Stiftung, H. (Ed.). *Transnational Organised Crime. Analyses of a Global Challenge to Democracy*. Transcript Verlag, p.128.

<sup>686</sup> Obokata, T. (2010). *Transnational Organised Crime in International Law*. Bloomsbury Publishing Plc, p.26.

on the fight against organised crime also contains similar wording defining ‘criminal organization’ as a structured association of more than two persons committing, for profit or material benefit, offences punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty.<sup>687</sup> Article 2 of the UN Convention referred to above defines a ‘serious crime’ as a ‘conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or more serious penalty. While there is similarity between the two instruments in terms of the meaning of ‘organised criminal group’ or ‘criminal organization’, the UN Convention remains the most important and legally binding instrument on transnational organised crime that states in all parts of the world can ratify.

Organised crime groups are characterized by the presence of individuals at the local, national, regional or transnational levels.<sup>688</sup> They are often dynamic networks with loose structures and international connections.<sup>689</sup> While there is consensus that organised crime tends to be restricted to illegal goods and services, it is also noted that organised criminal groups simultaneously engage in legal activities for three major purposes: concealing their illegal activities, washing the dirty money from crime, and using the laundering of profit from organised crime to gain respectability in society.<sup>690</sup>

Most doctrinal definitions of organized crime emphasize its primary aim as profit making, the focus of its activities on outlawed goods and services, the significance of violence and corruption in its maintenance, and its hierarchical structure and relative organizational permanency.<sup>691</sup> The consensus academic definition of organized crime reads as follows: Organised crime is a continuing criminal enterprise that rationally works to profit from illicit activities that are often in great public demand.<sup>692</sup> Organised crimes that are perpetrated across national borders are referred to as transnational organized crimes.<sup>693</sup> The concepts of transnational crime, organized

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<sup>687</sup> Article 1

<sup>688</sup> Buscaglia, E. (2013). “Judicial and social Conditions for the Containment of Organised Crime: A Best Practice Account”. In: Boll – Stiftung, H. (Ed.). *Transnational Organised Crime. Analyses of a Global Challenge to Democracy*. Transcript Verlag, p.61.

<sup>689</sup> *Ibid.*, p.62.

<sup>690</sup> Alemika Etannibi, E. O. (2013). *Op. Cit*, p.128.

<sup>691</sup> *Ibid.*

<sup>692</sup> Albanese, J. S. (2004). “North American Organised Crime”. *Global Crime* 6(1), p.9 & 10.

<sup>693</sup> Alemika Etannibi, E. O. (2013). *Op. Cit*, p.128.



crime and transnational organized crime are often unconsciously used synonymously but, in reality, they are distinct although interwoven phenomena. Hence, it is important to clarify this chapter's analytical concept, transnational crime.

Although transnational crime is a form of organised crime, it is not necessarily organised or perpetrated by organisations, particularly in the context of states where borders are fluid and goods distribution and supply networks are substantially controlled by informal sector.<sup>694</sup> Therefore, transnational crimes may be understood as criminal activities by an individual, individuals or even regimes, across two or more countries.<sup>695</sup> The distinctiveness of transnational crime is the breach of territorial sovereignty, involving crimes across and beyond borders. By its nature, it connects source, transit, and destination countries.<sup>696</sup>

Scholars advance different definitions of 'transnational crime'. Vincenzo Ruggiero put forward the standard definition of transnational crime as offences whose inception, prevention, and direct effects involve more than one country.<sup>697</sup> Pankratz and Hanns apply a constructivist approach to transnational crime and consider the phenomenon as a social construction.<sup>698</sup> Jay Albanese views transnational crime as a law violation that involve more than one country in its planning, execution, or impact.<sup>699</sup> Transnational crime can be defined simply as crimes that cross borders or acts that violate the laws of more than one country. The term 'cross-border crimes' is sometimes used as an equivalent to that of transnational crimes.<sup>700</sup> Article 3 (2) UN Convention on Transnational Organised Crime provides that an offence is transnational in nature if it is committed in one state but is planned or controlled in another ( (a), (b) ), if it is committed in one state by groups that operate in more than one states ( (c) ), or if it is committed in one state and

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<sup>694</sup> *Ibid.*

<sup>695</sup> *Ibid.*, p.127

<sup>696</sup> *Ibid.*, p.127 – 128.

<sup>697</sup> Ruggiero, V. (2000). "Transnational Crime: Official and Alternative Fears". *International Journal of the Sociology of Law*. 28, p.188.

<sup>698</sup> Pankratz, T. and M. Hanns (2012). "Understanding Transnational Organised Crime. A constructivist approach towards a growing phenomenon". *SIAC-Journal for Police Science and Practice* 2, p.42.

<sup>699</sup> Albanese J. (2012). "Deciphering the linkages between organised crime and transnational crime". *Journal of International Affairs* 66(1), p.1.

<sup>700</sup> See Alemika Etannibi, E. O. (2013). *Op. Cit.*, p.127.

impacts on other states ((d)). Subparagraph (c) expands the notion of 'transnational' to not only criminal activities but to actors too.

Transnational crimes are different from domestic crimes. They require two or more people to carry out criminal offenses which cannot simply be undertaken by offenders without contacts in other countries.<sup>701</sup> It might make sense to treat as domestic crimes those committed by local groups or gangs which do not operate beyond national borders, no matter how serious the crimes are in a given state or the gangs fit the definition of an organised criminal group under the UN Convention on Transnational Organised Crime. The level of required organisation in a transnational crime is arguable and may depend on the complexity of the networks involved.<sup>702</sup> There are more nuances that could be made to clarify the distinctiveness of transnational crimes from international crimes too. The difference between the two types of crimes is particularly blurred.<sup>703</sup> International crimes are crimes prohibited by international laws, norms, treaties and customs, whereas transnational crimes are specifically concerned with acts criminalised by the laws of more than one country.<sup>704</sup> Transnational crimes affect the interests of more than one country and not necessarily the world whereas the effect of international crimes, such as crimes against humanity, war crimes, and genocide, is global. That is not to deny the widely held opinion that transnational crimes constitute a global threat and challenge.

Different typologies of transnational criminal networks have been theorised by scholars. They include highly complex and hierarchical networks to less structured gangs and even loose individuals whose role may not involve huge operations.<sup>705</sup> The typologies advance social, cultural, political and economic explanations of transnational crime phenomenon and the operational structure of organised crime networks worldwide. Social explanations, for instance, put forward ethnical aspects to understand crime syndicates in Northern America or mafia network in Italy such as the Sicilian *Cosa Nostra*, or even the Japanese *Yakuza*.<sup>706</sup> Cultural

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<sup>701</sup> Albanese J. (2012). *Op.Cit.*, p.3.

<sup>702</sup> Felsen, D. and A. Kalaitzidis (2005). *Op.Cit.*, p.6.

<sup>703</sup> *Ibid.*

<sup>704</sup> *Ibid.*

<sup>705</sup> Pankratz, T. and M. Hanns (2012). *Op.Cit.*, p.46.

<sup>706</sup> Encyclopedia of Crime and Justice (2016). *Op.Cit.*, p.7-8.

explanations examine the involvement of family members in specific forms of organised crimes of which their relatives are victims. They have been used to understand organised crime at different levels in certain jurisdictions including Asia and Africa. For example, the belief in the aphrodisiac power of rhino horns in Chinese traditional medicine and in tiger penises in Korea, Vietnam and Indonesia, the use of shark fins for gourmet soup in China, is put forward to explain the thriving of poaching of endangered species.<sup>707</sup> Political explanations, by contrast, focus on the state apparatus and link organised crime to state failure, authoritarianism and weak rule of law.<sup>708</sup> It is often advanced that states' economic policies and prohibitions of illicit activities actually create opportunities for organised crimes such as medical drugs counterfeit, smuggling of cigarettes protected species, and prohibited substances, etc.<sup>709</sup> Some states' policies facilitating female labour export for overseas employment and promoting tourism as a foreign exchange earner allude to a certain theory of state's 'conspiracy' in transnational crime.<sup>710</sup> Similarly, a report on state-sponsored smuggling indicates an ironic situation where states enact laws and ratify international conventions prohibiting all sorts of illegal activities, on the one hand, and engage in same activities of which they financially benefit, for example sales in weapons, on the other hand.<sup>711</sup>

Economic explanations suggest that organised crime is a criminal enterprise aimed always at making profit and personal gain.<sup>712</sup> The profit motive distinguishes organised crime from international crimes whose aims could be political or religious hatred.<sup>713</sup> Economic approaches to organised crime analyse the criminal market from a supply-demand perspective, and makes a correlation between organised crime and the growth in demand for illegal criminal services.<sup>714</sup> Economic explanations view organised crime as a product of market forces and capable to

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<sup>707</sup> Viano, E.C. (2010). *Op.Cit.*, p.76.

<sup>708</sup> von Lampe, K. (2003). *The Use of Models in the Study of Organised Crime*. Paper presented at the Conference of the European Consortium for Political Research. Berlin, p.2.

<sup>709</sup> See the introduction of Prohibition in the eighteen amendment to the Constitution of the United States. In: Encyclopedia of Crime and Justice (2016). *Op.Cit.*, p.3

<sup>710</sup> Viano, E.C. (2010). *Op.Cit.*, p.68.

<sup>711</sup> *Ibid.*

<sup>712</sup> Ruggiero, V. (2000). *Op.Cit.*, p.193.

<sup>713</sup> Albanese J. (2012). *Op.Cit.*, p.2.

<sup>714</sup> *Ibid*, p.194. Also, Encyclopedia of Crime and Justice (2016). *Op.Cit.*, p.2 and 6.

respond to new demand and to strategically divert its illegal background by using legal business. Albanese and Pankratz and Hanns emphasise the importance of focusing on analysing the criminal market rather than the actors and networks, in order to understand the reasons organised crime flourishes.<sup>715</sup> Pankratz and Hanns too point out the need to include a 'marketplace approach' in addition to the organisational/network - focused perspective to transnational crime.<sup>716</sup>

As a form of organised crime, transnational crime is not just motivated by profit and personal gain from illicit activities but its existence is also sustained by the use of force, threats, monopoly control and corruption.<sup>717</sup> Organised criminals often use violence to maintain their control over victims, in cases of human trafficking and migrant smuggling,<sup>718</sup> for example, but also to impose their criminal activities on the populations and ascertain their power, in the case of warlords. They use violence not only to obtain and defend their control and possession of commodities but also for their own protection as well as that of their assets, and their illicit networks and businesses. Specifically, violence occurs in human trafficking, drug trafficking, arms sales, piracy, trafficking of minerals, warlordism, etc. It takes the form of murder, serious physical and psychological harm, damages to the environment and to animals including poaching of protected species.

If violence is the most visible *modus operandi* of organised crime, corruption plays a crucial role in its planning, execution and sustainment. Organised crime groups resort to corruption in order to obtain the goods, to avail them and to protect their members from prosecution. It seeks to infiltrate the state's system in order to secure the support it needs to prosper but also to establish a parallel system of power and control, undermining the state's capacity and accountability.

Despite the lack of consensus about the definition of transnational crime, there seems to be an agreement that it encompasses a wide array of criminal activities. This is reflected by various attempts at categorising transnational crime proposed by scholars and by the United Nations too.

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<sup>715</sup> Albanese J. (2012). *Op.cit.*, p.4 and 6.

<sup>716</sup> Pankratz, T. and M. Hanns (2012). *Op.Cit.*, p.46-47.

<sup>717</sup> Albanese J. (2012). *Op.Cit.*, p.3. Also, Encyclopedia of Crime and Justice (2016). *Op.Cit.*, p.12.

<sup>718</sup> Ruggiero, V. (2000). *Op.Cit.*, p.193. Also, UNODC. *The Globalisation of Crime*. (2010). *Op.Cit.*, p.34.

The categorisation proposed by Jay Albanese,<sup>719</sup> for example, is particularly striking for its consideration of three broad objectives of transnational crimes as follows:

- Provision of illicit goods: Drug trafficking, stolen property and counterfeiting.
- Provision of illicit services: Human trafficking, cybercrime and fraud, commercial vices (Example, illegal sex and gambling).
- Infiltration of business or government: Extortion and racketeering, money laundering, and corruption.

There are unlimited criminal activities that could constitute transnational crimes. The progress in new technologies creates new forms of crimes or at least changes the way the crimes are committed. A transnational crime, whether classic types such as drug and human trafficking, or more modern and computer aided forms of hacking or identity theft, will necessarily fit any of the categories above. Computer-aided crimes are not often new crimes but rather modern forms of existing crimes that are made possible by the use of sophisticated technology.<sup>720</sup>

#### 4.3. The particular context of East Africa

It is crucial to understand the reason East Africa is particularly prone to transnational crime. The end of the Cold War spurred a series of political and economic reforms that prompted African states to abandon authoritarian regime types in favour of more democratic and pluralist governance systems.<sup>721</sup> Many African states, including East Africans, started to liberalise their economies and to privatise the public service in an attempt to achieve increased efficiency and productivity.<sup>722</sup> At the same time, the wave of the new regionalism revived many regional organisations that had previously collapsed, such as the EAC, and inspired the creation of new ones. The spirit of the new regionalism is open market, the recognition of bottom-up processes and the participation of ordinary people in the conduct of regional projects<sup>723</sup>. This market driven

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<sup>719</sup> Albanese J. (2012). *Op.Cit.*, 2.

<sup>720</sup> *Ibid.*, p.3

<sup>721</sup> Shaw, M. (2005) "Organised Crime in Africa". In: Reichel, P. (Ed.) *Handbook of Transnational Crime and Justice*. Sage Publications. London, p.369.

<sup>722</sup> *Ibid.*

<sup>723</sup> Acharya A., (2012). "Comparative Regionalism: A Field Whose Time has Come?". *The International Spectator* 47(1), p.8-9 Also, Kitipov. J. (2012). "African integration and inter – regionalism: The regional economic communities and their relationship with the European Union". *Strategic Review for Southern Africa* 34(1), p.23.

regional cooperation meant the elimination of barriers to trade, the opening of borders to allow unrestricted movement of people, goods and services, and the economic integration of the countries.<sup>724</sup> This situation raises concerns in the context of East Africa, and the whole Africa indeed, where the boundaries between formal and informal economies are blurred.<sup>725</sup> The prominence of the informal economy in many parts of Africa, including East Africa, is emphasised in many studies and is often associated with what has come to be termed ‘shadow regionalism’, which is a complex mode of regionalism supported by regime actors for their self-financial interests, and involving small-scale traders and vendors of all types of goods (fruits, staple products, clothes, small appliances, etc.).<sup>726</sup> Söderbaum argues that shadow regionalism in Africa takes advantage of large border disparities and it has, hence, expanded to more criminal activities such as illicit trade in drugs such as heroin, cocaine, mandrax, and light weapons, etc.<sup>727</sup> In addition to the threat posed by the informal economy in East Africa, poverty, social inequality, economic crisis are all factors that explain the reason informal workers, petty traders, street vendors, self-employed agents, families engage in illicit and criminal market.<sup>728</sup>

Other contextual factors that explain organised crime in East Africa include lack of or low public awareness of organised crime as well as poor knowledge and the limited capacity of law enforcement agencies to deal with the phenomenon.<sup>729</sup> The forces in the EAC Partner States have different levels of training and appreciation on how to deal with organised crimes.<sup>730</sup> The lack of knowledge affects case management and the ability of law enforcement agencies to prosecute transnational organised crime which, in turn, has an effect on conviction rate.<sup>731</sup> East Africa, like most of the continent, is not exempted from this challenge.

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<sup>724</sup> Pirozzi, N. and A. Godsäter (2015). “The EU and Africa: Regionalism and interregionalism beyond institutions”. *Atlantic Future working paper* 26, p.6-8.

<sup>725</sup> Shaw, M. (2005). *Op.Cit.*, p.367.

<sup>726</sup> Söderbaum, F. (2010). *“With a Little Help From My Friends”: How Regional Organisations in Africa Sustain Clientelism, Corruption and Discrimination*. Swedish Political Science Association annual conference, p.8.

<sup>727</sup> *Ibid.*, p.9.

<sup>728</sup> UNODC (2009). *Op.Cit.*, p.3 and 11.

<sup>729</sup> *Ibid.*, p.15.

<sup>730</sup> Interview with Respondent 5.

<sup>731</sup> *Ibid.*

Above all, corruption is perhaps the most important factor that enables and encourages criminal organisations to operate their illegal businesses without any fear of arrest and prosecution. As suggested in the previous chapter, corruption in East Africa is endemic. Except Rwanda which has been ranked 50 in the Corruption Perceptions Index 2016 and third to Botswana and Mauritius in Africa, all other East African countries are placed among the most corrupt amongst 176 surveyed countries. South-Sudan is listed as second to the last, whereas Somalia, one of the countries in the broader Eastern Africa region is last.<sup>732</sup> Of significance for this research, the police and the judiciary are cited as the most corrupt institutions in East Africa.<sup>733</sup> The respondents to the interviews for this thesis too recognized corruption is rampant in the EAC and they made a correlation between high levels of corruption in national criminal justice agencies and the occurrence of crimes.<sup>734</sup> Corruption is not just a means for criminal organisations to facilitate their activities but it is also, as such, an organised crime. As a means, it is used by criminal organisations to seek for protection from powerful elites and to guarantee themselves against prosecution, indictment, sentencing and imprisonment. Criminal organisations strive to infiltrate the state apparatus at all levels. Therefore, corruption represents a threat in terms of transnational crime in East Africa, but an examination of this particular aspect is beyond the scope of this thesis.

The growth of transnational crime in East Africa is also explained by the weakening or the implosion of the state's authority in neighbouring countries such as the DRC and Somalia and the onset of a series of brutal wars since the early 1990s in Rwanda and the DRC.<sup>735</sup> Ongoing political instability in countries surrounding the EAC (the DRC, Somalia, Central African Republic) and within the Community itself (Burundi) has unleashed wave of violence and spread small arms, light weapons and other munitions amongst civilians and non-state armed groups, so called negative forces, such as the Ugandan LRA, the Kenyan *Mungiki*, the Rwandan FDLR, and the Somali *Al Shabaab*. These non-state armed groups operate across the borders of East African

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<sup>732</sup> Corruption Perceptions Index 2016. [www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016](http://www.transparency.org/news/feature/corruption_perceptions_index_2016), accessed on 10<sup>th</sup> July 2017.

<sup>733</sup> *Ibid.*

<sup>734</sup> Interviews with Respondents 3 and 7.

<sup>735</sup> Shaw, M. (2005). *Op.Cit.*, p.369.

countries. The LRA, for example, although eradicated in Northern Uganda where it originated, is currently believed to have established itself across the DRC, the CAR and South Sudan. Similarly, the Rwandan FRDL operate in DRC while Somali *Al Shabaab*'s repeated attacks in Kenya and Uganda has raised considerable concern about terrorism in the region. The involvement of non-state armed groups in organised crime and illicit trafficking in East Africa has been documented by various reports. The smuggling of minerals and timber from Eastern DRC, for example, has been attributed to the LRA and the FDLR.<sup>736</sup> Also, piracy on the Indian Ocean has been linked to *Al Shabaab* militias. The presence of non-state armed groups in the EAC and its surrounding neighbourhood, their involvement in organised crime and the amount of violence they cause to the populations contribute to making the region more vulnerable to organised crime and provoke illegal immigration of East Africans, exposing women and children in particular to sexual exploitation and forced labour.

The most significant contextual explanation of organised crime in East Africa relates to its strategic location off the shores of the Indian Ocean with major ports in Kenya (Mombasa) and Tanzania (Dar es Salaam, Lindi and Tanga) and its long history of trade with Arab traders. East Africa makes an enormous contribution to global trade since over ninety percent of such trade is conducted by sea. The region has been identified as a hub for transnational crime and illicit trafficking since it is located in the middle of the trade route between Asia and Europe.<sup>737</sup> East Africa is said to increasingly playing middleman role for illicit trade.<sup>738</sup>

A criminal hub is, at least in relation to the EU, as quoted by Pankratz and Hanns, a conceptual entity generated by a combination of factors, such as proximity to major target markets, geographic location, infrastructure, types of organised crime groups and migration processes involving key criminals or organised crime groups in general.<sup>739</sup> East Africa presents all the above characteristics. It is a transit zone for illicit trade and a source as well as a destination for illicit and criminal goods. The UNODC transnational organised crime threat assessment report on

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<sup>736</sup> UNODC (2010). *Op.Cit.*, p.264-265.

<sup>737</sup> Shaw, M. (2005). *Op.Cit.*, p.380.

<sup>738</sup> *Ibid.*, p.381.

<sup>739</sup> Pankratz, T. and M. Hanns (2012). *Op.cit.*, p.44.



Eastern Africa indicates that the cost of trafficking seems not to discourage organised crime networks whose objective is to find areas where their business and networks would circumvent any interference, arrest or prosecution.<sup>740</sup> Among the factors that motivate criminal organisations to identify safer routes is weak criminal justice systems and legal loopholes or simply lack of appropriate legislation to curb organised crime. Accordingly, transnational crime is seen as a major threat to the rule of law, if the rule of law was to be defined as the just administration of predictable social rules (order) and their compliance with international standards (human rights).<sup>741</sup>

#### 4.4. Transnational networks in East Africa

Understanding how transnational criminal networks operate in East Africa is vital both for preventive measures and for policymaking in general. A distinction needs to be made between the criminal networks, on the one hand, and the routes and the means they use, on the other hand. Criminal network refers to organised crime group as defined in Article 2(a) of the UN Convention Against Transnational Organised Crime: *a structured group of three or more persons existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefits*”.

Transnational crime in East Africa is conducted by powerful criminal networks that involve Asian and European groups, regional groups as well as local gangs. These criminal networks are involved in the procurement, processing and transport of illicit goods across the borders. Various nationals have been mentioned in the Asian networks which involve Chinese, Iranians, Pakistani, Indians and Malaysians. Regional gangs comprise mainly Nigerians based in East Africa, some holding allegedly dubious South African passports obtained through corruption, fraud, or marriage.<sup>742</sup> East African criminal networks are said to be fluid and flexible.<sup>743</sup> They comprise national criminal syndicates, family networks with extended family across country borders,

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<sup>740</sup> UNODC. (2013). *Transnational Organised Crime in Eastern Africa: A Threat Assessment*, p.8.

<sup>741</sup> UNODC (2013). *Op.Cit.*, p.1.

<sup>742</sup> *Ibid*, p.24.

<sup>743</sup> UNODC (2009). *Op.Cit.*, p.13.

independent businesses and small scale loose organisations.<sup>744</sup> These local gangs are organised into middlemen who run façade businesses, and buyers. The collaboration and interaction among local and foreign criminal groups enable a transfer of skills, enhance the capabilities and organisational infrastructure of the groups, and facilitate access to resources.<sup>745</sup> At the local level, influential people, political figures and people in high positions within the judiciary, law enforcement, the military, abusing their positions play a vital role in facilitating the crimes in East African countries.<sup>746</sup> Reports allege that business people and non-state armed groups engage in arms trade across the borders and barter weapons for timber, minerals, coffee and commodities such as motorcycles.

The *modus operandi* of transnational criminal networks in East Africa includes the use of transit by sea, air and land. In drug trafficking, for example, various reports have established that heroin is transported from Southwest Asia across the sea to the shores of East Africa. It is suggested that Afghan opium is moved by land across the Makran region to Pakistan.<sup>747</sup> The drug is then shipped to the ports of East Africa. It is suggested that the seizure of drugs in East Africa during the monsoon suggests that the drugs are carried by dhows used by Arab traders for centuries, to carry merchandise on the Indian Ocean for trade along the coasts of East Africa.<sup>748</sup> It is further argued that maritime containers are also used for the transport of drugs outside the monsoon season. Containers serve also for moving drugs inland from East African seaports. Main East African Sea ports in Mombasa and Dar es Salaam are targeted though traffickers move further down to southern Tanzania port of Lindi, for example, to avoid any interception.

East Africa is particularly attracted as a transit zone because of its seaports. For transnational criminal networks, the coasts of East Africa represent a remote area and a safer itinerary for trafficking their illicit goods. East Africa plays the role of transit zone for drugs destined for European and West African markets. A possible explanation for this diverted route is tight control

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<sup>744</sup> *Ibid.*

<sup>745</sup> East African Community (2015). *Op.Cit.*, p.5.

<sup>746</sup> UNODC (2009). *Op.Cit.*, p.40.

<sup>747</sup> UNODC (2013). *Op.Cit.*, p.4.

<sup>748</sup> *Ibid*, p.21.

in the Balkan route that connects Southwest Asia to South-Eastern Europe via Turkey.<sup>749</sup> There are concerns that East Africa might become the new Balkan route for global drug trafficking.<sup>750</sup>

In addition to the maritime routes, transnational criminal networks also operate by air. Specifically, illicit trafficking is conducted through airfreight and air courier. Air transport is used not only for illicit goods in transit but also for those destined to East Africa as well as for those originating from the region. Major airports, particularly Entebbe, in Uganda, and Jomo Kenyatta, in Kenya, are mentioned as growing targets for traffickers. Possible reasons advanced include weak law enforcement capability and corruption. With an expanding air traffic and connections to major cities such as Dubai in the UAE and Doha in Qatar, East Africa is increasingly being seen as a hub for transnational crime.

The third method used by transnational criminal networks in East Africa is land transit. Traffickers take advantage of porous borders to move illicit goods between East African countries. Lengthy borders, informal border crossing points, inadequate human and communication resources in some border posts, especially in remote, rural and coastal regions, shortage and lack of electricity are all make East African national frontiers porous.<sup>751</sup> Reports point out that land is used by criminals to smuggle timber, wildlife and minerals across Eastern DRC to East Africa, for shipment to Europe.<sup>752</sup> Land is also the main transportation way for intra-regional transnational crime across the borders of East African countries as well as for illicit drugs destined to South Africa and Mauritius.<sup>753</sup>

East Africa is not just a transit. It is also a destination and a source or origin for illicit goods such as drugs, for trafficking in human beings and smuggling of migrants, as well as illicit trafficking of ivory. The trafficking involves expatriate communities in East Africa, notably Chinese for illicit trade of ivory. A link has not yet been established between Iranian Balochs traffickers arrested in East Africa in connection with the trafficking of drugs and Baloch communities established in the

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<sup>749</sup> *Ibid*, p.22.

<sup>750</sup> *Ibid*

<sup>751</sup> East African Community (2015). *Op.cit.*, p.48-49.

<sup>752</sup> UNODC (2011). *Organised Crime and Instability in Central Africa*, p.17.

<sup>753</sup> UNODC (2013), p.23.

region.<sup>754</sup> Reports, however, indicate, in cases of human trafficking, that the presence of an established diaspora often contributes to the facilitation of trafficking.<sup>755</sup>

Whether seaports, airports or land, traffickers are attracted by the low likelihood of detection and interception, and the prospect of corrupting or bribing the security and control professionals at border posts.

#### 4.5. Specific transnational crimes in East Africa

##### 4.5.1. Trafficking in human beings and smuggling of migrants

Human trafficking and migrants smuggling constitute two overlapping forms of the same criminal activity, irregular migration, an area that has become profitable for organised criminal who provide their services to people from less-developed regions of the world to reach richer countries.<sup>756</sup> The distinction between the two phenomena was never formally formally established in law until the adoption of two protocols supplementing the UN Convention against Transnational Organised Crime adopted in 2000, also referred to as the Palermo Convention. The first, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, which entered into force on 25 December 2003, defines trafficking in persons as the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.<sup>757</sup> The second, the Protocol against the Smuggling of Migrants by Land, Sea and Air, entered into force on 28 January 2004, defines the smuggling of migrants as the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.<sup>758</sup>

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<sup>754</sup> *Ibid*, p.24.

<sup>755</sup> UNODC (2009). *Op.Cit.*, p.18.

<sup>756</sup> *Ibid*, p.15.

<sup>757</sup> Article 3 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, supplementing the UN Convention against Transnational Organised Crime.

<sup>758</sup> Article 3 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organised Crime.

Further distinction between human trafficking and migrant smuggling is elaborated in the two protocols and concerns the means by which the two acts are committed and the relevance of the consent of the victims. Accordingly, the purpose of human trafficking is exploitation for prostitution, forced labour, slavery, servitude or the removal of organs and it is characterised by the coercion or the deception of victims whose consent is de facto nullified. Migrant smuggling, however, is characterised by a profit motive deriving from a contractual relationship between the would-be migrant and the smuggler<sup>759</sup>, which often terminates upon the arrival in the destination country. Hence, the Protocol against the Smuggling of Migrants does not make any reference to migrants as victims and it does not state any provision regarding their consent, presumably because they are considered to have voluntarily used smugglers.<sup>760</sup>

Human trafficking as well as migrant smuggling in East Africa are both motivated by economic and political reasons such as poor and conflict torn states, unemployment, income levels, the deaths of parents, education and the prospect of better conditions and increased opportunities in other states.<sup>761</sup> Most victims are lured by the promise of a good job, a higher salary, improved education opportunities and other favourable prospects.<sup>762</sup> No extended research has specifically addressed the issue of migrant smuggling in the EAC. Rather, most reports have examined migrant smuggling in the wider Eastern Africa region and the flow of illegal migrants from the horn of Africa through the Mediterranean to Europe and through the Gulf of Aden to the Middle East and South East Asia through Yemen. However, Kenya in the EAC is regarded as a destination country for illegal migrants.

Human trafficking in East Africa occurs at the domestic, intra-regional, and international levels. At the domestic level, child trafficking constitutes the largest human trafficking problem, particularly the exploitation of girls in domestic servitude as well as sexual exploitation of girls in tourist area and urban centres.<sup>763</sup> It is estimated that about 50 girls, mainly from Somalia, are

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<sup>759</sup> Di Nicola, A. (2005). "Trafficking in Human Beings and Smuggling of migrants" In: Reichel, P. (Ed) (2005) *Handbook of Transnational Crime and Justice*. Sage Publications. London, p.183-184.

<sup>760</sup> *Ibid*, p.184.

<sup>761</sup> UNODC (2009). *Op.Cit.*, p.16 and 18.

<sup>762</sup> *Ibid.*, p.18.

<sup>763</sup> East African Community (2015). *Op.Cit.* p.5

trafficked every week from north-eastern Kenya to Nairobi.<sup>764</sup> Boys too are trafficked for sexual exploitation and for forced labour as farm labourers and cattle herders in pastoral communities, and in mines, in factories, in hunting, in fishing boats on the high sea and lakes and in criminal and violent gangs such as rebel groups and armed forces.<sup>765</sup> Other exploitative activities of human trafficking include, human sacrifice and child marriage.<sup>766</sup> The trafficking is often facilitated by the victims' family members, friends, or intermediaries.<sup>767</sup> Human trafficking in East Africa involves a great amount of violence by armed forces such as the Ugandan LRA and ADF, Rwandan FDLR and Somali *Al Shabaab* who forcefully enrol children and adults into their insurgency movements, often as soldiers, sex slaves and ammunition porters, spies and messengers, in addition to drug abuse. The abduction of children and adults by the Ugandan LRA has, particularly, attracted a good deal of attention as many of the victims in Uganda, DRC, South Sudan and Central African Republic remain unaccounted for. The UNODC 2009 report advances the view that there are indicators that the trafficking of children in conflict zones is becoming a growing trend linked to sophisticated transnational criminal networks.<sup>768</sup>

At the intra-regional level, large scale transnational human trafficking occurs between the countries in the region. Rather worryingly, child and women trafficking and smuggling is said to be conducted in refugee camps, notably in Rwanda and Kenya, to countries in the region, to South Africa, Northern America and Europe.<sup>769</sup> Child sex trafficking too, along the borders of the EAC PS is said to have become extensive.<sup>770</sup> Also, child and women trafficking in the region is boosted by the growing tourism and sex industry.<sup>771</sup>

At the international level, large scale trafficking of children, women and to some extent men involve bigger organised networks of African citizens or international syndicates.<sup>772</sup> For example, in December 2010 the police in Rwanda discovered a group of 54 Bangladeshi men illegally

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<sup>764</sup> *Ibid.*, p.7.

<sup>765</sup> East African Community. (2015), *Op.Cit.*, p.6. Also, UNODC (2009). *Op.Cit.*, p.18.

<sup>766</sup> East African Community. (2015), *Op.Cit.*, p.7.

<sup>767</sup> *Ibid.*, p.5

<sup>768</sup> UNODC (2009). *Op.Cit.*, p.17.

<sup>769</sup> East African Community. (2015). *Op.Cit.*, p.7 and 8.

<sup>770</sup> *Ibid.*, p.5

<sup>771</sup> UNODC (2009). *Op.Cit.*, p.18.

<sup>772</sup> *Ibid.*, p.18.

brought into the country, who were being trafficked by a fellow Bangladeshi to Mozambique as part of trafficking ring.<sup>773</sup> The victims were aged between 19 and 49; their passports were found in the hands of the trafficker at arrest.<sup>774</sup> Confinement and confiscation of passports, as well threats demanding the refund of expenses incurred on air tickets and processing residence, in case a victim attempts to terminate a job contract or demand to be let free from forced prostitution, are the common control mechanisms of traffickers.<sup>775</sup> It is reported that child trafficking in Uganda has become a booming business with an average of 60 children per day leaving the country.<sup>776</sup>

The main destination of international human trafficking in East Africa is the Middle East, especially the Gulf countries. East Africans are trafficked to Yemen, Oman, the UAE, Saudi Arabia, Kuwait, Qatar, Iraq, Lebanon, Turkey and Syria.<sup>777</sup> Other destinations include South Africa, Mozambique, Ethiopia, Zambia, Thailand, Malaysia, China, Pakistan, India, Czech Republic, Italy, France, the UK, Germany and the US.<sup>778</sup> Although East African countries are primarily seen as an origin and source for human trafficking, they are also, to a much lesser extent, destination and transit countries for victims trafficked from South India, other African countries and Madagascar.

#### 4.5.2. Drug trafficking

Drug trafficking is the illicit trade involving the cultivation, manufacture, distribution and sale of substances which are subject to drug prohibition laws.<sup>779</sup> Drug trafficking in East Africa seems to be a recent phenomenon. Until early 2000s, drug trafficking in the region was not big enough to attract the attention of the international community. Since then, this trafficking has considerably increased in proportions and varieties of drugs. East Africa has now been identified as a major transit and a destination for hard drugs from South Asia and Latin America. Powerful drug cartels have been identified in the region, especially a Kenyan cartel comprising current and former parliamentarians, activists linked to politicians, a prominent businesswoman and customs

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<sup>773</sup> <https://www.newtimes.co.rw/section/read/27188>, accessed on 19<sup>th</sup> September 2017.

<sup>774</sup> *Ibid.*

<sup>775</sup> East African Community (2015). *Op.Cit.*, p.5.

<sup>776</sup> *Ibid.*, p.7.

<sup>777</sup> *Ibid.* p.6 and 8.

<sup>778</sup> *Ibid.*

<sup>779</sup> *Ibid.*, p.11.

personnel working with a networks of Chinese, Somali and Pakistani to smuggle drugs.<sup>780</sup> Also, reports by law enforcement experts in Iran and Pakistan have identified the increasing activities of Eastern African drug cartels in their countries.<sup>781</sup> The types of drugs trafficked in the region include cannabis, heroin, cocaine, methamphetamine, mandrax and drug precursors such as ephedrine, pseudoephedrine and anthranilic acid.

Cannabis is by far the most widely consumed and trafficked drug in East Africa. It is extensively produced in Tanzania and Uganda. A review of reports conducted by the UNODC and the EAC reveals that East Africa is beset by the trafficking of hard drugs, especially heroin and cocaine. As indicated above, the flow of hard drugs in East Africa has not been alarming until the first seizures of large amounts, especially for heroin, pointing to the increase of drug trafficking in the region. Kenya remains the most affected country in the region, followed by Tanzania. Their coastal borders along the Indian Ocean and ports constitute a favourable entry point for large maritime shipments of heroin from South Asia and cocaine from South America. Elsewhere in Uganda and Rwanda, for example, there has been evidence of air traffic for heroin and cocaine and an increase use of postal and courier services, especially for heroin, and cocaine to a lesser extent. As alleged in a UNODC report, any seizure of 50Kg of heroin is considered large, particularly when encountered far from the major sources.<sup>782</sup> The enormous amounts of heroin intercepted in Kenya, particularly, suggest that East Africa is the locaton of significant levels of drug trafficking. Two consignments of 787Kg of heroin worth US\$278M were intercepted off the coasts of Kenya by the Australian Navy in April and November 2014.<sup>783</sup> Also, the Kenyan police detected 342Kg of heroin in the tank of a ship docked at the Port of Mombasa.<sup>784</sup> More than a tonne of heroin worth US\$ 268M was seized by the Australian navy in a dhow in Kenyan waters, in April 2014.<sup>785</sup> At least three more large seizures involving hundreds kilogrammes of heroin each, off the coast

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<sup>780</sup> *Ibid.*, p.14.

<sup>781</sup> UNODC (2009). *Op.Cit.*, p.28.

<sup>782</sup> UNODC (2013). *Op.Cit.*, p.21

<sup>783</sup> East African Community (2015), *Op.Cit.*, p.14.

<sup>784</sup> *Ibid.*

<sup>785</sup> *Ibid.*



of Tanzania, are reported to have been conducted by the multinational Combined Maritime Forces.<sup>786</sup>

If heroin is clearly the most problematic illicit drug in East Africa, large proportions of cocaine have also been detected in the EAC countries. Cases include the seizure, in 2004, of 701Kg and 253Kg of cocaine respectively concealed in two containers in an outbound cargo vessel off the coast of Malindi and in a refrigerated container in a warehouse in Nairobi.<sup>787</sup> In Kenya, a major seizure of 1.2 tons of cocaine was carried out in the Port of Mombasa in 2006.<sup>788</sup> Other seizures in Dar es Salaam, Tanzania, on 4 March 2011 involved 81Kg of cocaine and 30Kg of cocaine alongside 67Kg of heroin on 7 September 2011.<sup>789</sup>

In Rwanda, 7.3Kg of cocaine were intercepted at Kigali International Airport in November 2014, and 2.5Kg in January 2015.<sup>790</sup> In both cases, the drugs originated from Brazil and were concealed in women's handbags. Another seizure involved 13.5Kg of cocaine intercepted at Kigali International Airport in February 2015 and involved three suspects of whom two Rwandan women holding Belgian passports.<sup>791</sup> It is clear that drug traffickers have organised themselves in criminal groups and they have established extensive international links globally. The existence of at least ten major international drug trafficking networks, headed by West Africans but also involving Kenyans have been identified in Kenya.<sup>792</sup> The majority of traffickers in Uganda, allegedly, are Nigerians although Ugandans too have recently been recruited into the trade.<sup>793</sup> More interceptions of cocaine are mentioned in Uganda, with 32Kg of cocaine seized by Police anti-narcotic squad at Entebbe International Airport, on 12 July 2014, and the destruction of 159.68Kg of assorted drugs including 91Kg of cocaine, 9Kg of heroin, 41Kg of methamphetamine and 16Kg of ephedrine.<sup>794</sup> Minor detections of methamphetamine in transit to South Africa have

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<sup>786</sup> UNODC (2013). *Op.Cit.*, p.21.

<sup>787</sup> UNODC (2009). *Op.Cit.*, p.20.

<sup>788</sup> *Ibid.*, p.30.

<sup>789</sup> *Ibid.*, p.20.

<sup>790</sup> East African Community (2015), *Op.Cit.*, p.12.

<sup>791</sup> *Ibid.*

<sup>792</sup> *Ibid.*, p.13.

<sup>793</sup> *Ibid.*

<sup>794</sup> *Ibid.*

been reported in the region.<sup>795</sup> The diversion or attempted diversion of (essential chemical) precursors in East Africa has also been reported, with alarming quantities; as much as two and half tonnes of ephedrine and pseudoephedrine stolen in Kenya and Tanzania in about 20 incidents between 2009 and 2011.<sup>796</sup> The interception in 2007 by the Indian authorities, of 5 tons of anthranilic destined for Kenya is seen as an evidence of the emergence of mandrax in the region, anthranilic acid being a substance used in the production of mandrax.<sup>797</sup>

#### 4.5.3. Money laundering

Money laundering is the process of concealing illicit gains that were generated from criminal activity. As such, it was first defined in Article 3(1) of the UN Convention against illicit traffic in narcotic drugs and psychotic substances of 1988, the Vienna Convention, basically as the process of concealing or disguising the illicit origin of proceeds (money or property) of crimes related to drugs.<sup>798</sup> The definition of money laundering has been expanded to include other serious offences, given that considerable profits are generated by other criminal activities and organised crime too. Accordingly, the UN Convention against transnational organised crime of 2000 adopted the same definition of money laundering as the Vienna Convention and requested states to apply the definition to “the widest range of predicate offences”. The FATF too, an inter-governmental body that sets and monitors international standards for anti-money laundering

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<sup>795</sup> *Ibid.*, p.12.

<sup>796</sup> UNODC (2013). *Op.Cit.*, p.20.

<sup>797</sup> UNODC (2009). *Op.Cit.*, p.30.

<sup>798</sup> Article 3(1)(b):

- i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;
- ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph a) of this paragraph or from an act of participation in such an offence or offences;

Article 3(1)(c):

- i) The acquisition, possession or use of property, knowing, at the time of receipt,
- ii) that such property was derived from an offence or offences established in
- iii) accordance with subparagraph a) of this paragraph or from an act of
- iv) participation in such offence or offences;

regulations, urges states to “*apply money laundering to all serious offences, with a view to including the widest range of predicate offences.*”<sup>799</sup>

Money laundering facilitates a wide range of criminal activities such as tax crimes, frauds, computer crime, trafficking in drugs and humans, prostitution rings, illegal sales of weapon, embezzlement and corruption.<sup>800</sup> More specifically, corruption and money laundering are intrinsically linked as is money laundering closely connected to the financing of terrorism. As such, money laundering poses a threat to the security of the global financial system.<sup>801</sup> Predicate offences can generate huge amounts of proceeds and substantial profits for the individuals or groups involved in the criminal acts. The objective of launderers is to disguise the illegal origin of criminal proceeds in order to legitimise the ill-gotten gains of the crimes, by washing “dirty money” to be used later without raising suspicion.<sup>802</sup> It is globally accepted that money laundering involves three stages: Placement (the goal in this stage is to deposit criminal proceeds, generally cash, into a bank account at home or abroad); layering (the goal in this stage is the concealment of the criminal origin of the proceeds); and integration (the goal in this final stage is to use criminal proceeds for personal benefit. The integration phase may be further divided into two sub-phases: justification and investment).<sup>803</sup>

Money laundering in East Africa is said to be on the rise.<sup>804</sup> The region is also described as vulnerable to money laundering for several reasons. Firstly, informal and cash-based economy is prominent in most EAC countries as is the case in Africa in general.<sup>805</sup> Secondly, porous borders and the influx of refugees, coupled with weak customs and tax collection capacity create vulnerabilities.<sup>806</sup> Thirdly, an increasing level of technology penetration and the transformation of the banking and financial sectors, specifically mobile money and online banking, facilitate the

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<sup>799</sup> FATF (2012-2017). *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation*, p.10.

<sup>800</sup> OECD (2009). *Money Laundering Awareness Handbook for Tax Examiners and Tax Auditors*, p.13.

<sup>801</sup> Global Centre on Cooperative Security (August 2014). Tracking Progress, at [www.globalcenter.org/wp-content/uploads/2014/08/AML\\_CFT-Developments-in-East-Africa.pdf](http://www.globalcenter.org/wp-content/uploads/2014/08/AML_CFT-Developments-in-East-Africa.pdf), accessed on 15 July 2017.

<sup>802</sup> OECD. (2009), *Op.Cit.*, p.11 & 13.

<sup>803</sup> *Ibid.*, p.13.

<sup>804</sup> UNODC (2009). *Op.Cit.*, p.39.

<sup>805</sup> Global Centre on Cooperative Security (August 2014). *Op.Cit.*

<sup>806</sup> US Department of State. Countries/ Jurisdictions of Primary Concern- Uganda, at [www.state.gov/j/inl/rls/nrcrpt/2014/supplemental/](http://www.state.gov/j/inl/rls/nrcrpt/2014/supplemental/), accessed on 29 September 2017.

transfer of considerable amounts of money across borders and make illicit financial flow relatively easy.<sup>807</sup> Fourthly, black market for smuggled goods and grey market goods is thriving, especially in Kenya, Uganda and Tanzania.<sup>808</sup> It is reported that, in Kenya, goods marked for transit to the northern corridor countries of which Uganda, Rwanda, Burundi and South Sudan are part, are exempted from Kenyan customs duties and are often sold through.<sup>809</sup> The fifth vulnerability is, the prevalence of alternate, cash-based, unregulated and unlicensed informal remittance systems, known as *Hawala*, in Kenya, Tanzania (especially Zanzibar) and Uganda, that facilitate cash-based unreported transfers both within the countries and across the borders.<sup>810</sup> Informal remittance systems are used by nationals, by specific ethnic groups such as Pakistani, Indians and Somalis, as well as foreign refugee populations. Sixth, poor financial regulatory mechanisms alongside weak legislative framework to combat money laundering, coupled with limited law enforcement and judicial capacities to respond to money laundering, make East Africa vulnerable and attractive to money laundering.<sup>811</sup> Last, there is large scale corruption involving officials and their associates,<sup>812</sup> also known as grand corruption, which the Conference of States Parties to the UN Convention against Corruption (2015) defines as an expression used to describe corruption that pervades the highest levels of government, engendering major abuses of power.<sup>813</sup> .

Money laundering in East Africa derives largely from embezzlement, corruption, misappropriation of public funds and foreign aid, abuse of public procurement, frauds, illicit

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<sup>807</sup> East African Community. (2015), *Op.Cit.*, p.20.

<sup>808</sup> United States Department of State. *Money laundering and Financial Crimes*. INCSR II (2017), p.116.

<sup>809</sup> US Department of State. Countries/ Jurisdictions of Primary Concern- Kenya, at [www.state.gov/j/inl/rls/nrcrpt/2015/vol2/](http://www.state.gov/j/inl/rls/nrcrpt/2015/vol2/), accessed on 29 September 2017.

<sup>810</sup> *Hawala* means 'transfer' in Arabic. It has come to mean 'transfer of money' in *Hindu* and *Urdu*, or even 'trust' because of the great deal of trust required for the system to work. See Joyce, E. (2005). "Expanding the International Regime on Money Laundering in Response to Transnational Organised Crime, Terrorism, and Corruption". In: Reichel, P. (Ed.) (2005). *Handbook of Transnational Crime and Justice*. Sage Publications. London, p.84.

<sup>811</sup> Global Centre on Cooperative Security (August 2014). *Op.Cit.*

<sup>812</sup> Mniwasa, E.E. (2004). "Detection and Suppression of Money Laundering in Tanzania". In: Goredema C. (Ed.) *Tackling Money Laundering in East and Southern Africa: An Overview of Capacity*. Institute for Security Studies Monograph 108, p.39 and 51. Also, US Department of State. Countries/ Jurisdictions of Primary Concern- Uganda, [www.state.gov/j/inl/rls/nrcrpt/2014/supplemental/](http://www.state.gov/j/inl/rls/nrcrpt/2014/supplemental/) And, United States Department of State. *Money laundering and Financial Crimes*. INCSR II (2017), p.170.

<sup>813</sup> Ayodeji Gafar, I. (2019). "Grand Corruption in Sub – Saharan Africa and the Feasibility of Establishing International Anti – Corruption Court", *AUDA* 11(1), p.7

trades, trafficking in drugs, counterfeit, tax evasion, smuggling of minerals, trade in illegal timber, wildlife trafficking, arms trade, stolen motor vehicles and Internet crime. Trade based money laundering or the use of cash-based business remains the main method used to launder the proceeds of crime in East Africa, particularly real estate, trade in securities, tax evasion, and cash and bogus sales transactions.<sup>814</sup> Laundered money in East Africa has both domestic and transnational dimensions.<sup>815</sup> The domestic dimension encompasses criminal activities that produce and invest proceeds locally.<sup>816</sup> In the transnational dimension, the criminal activities either involve transnational groups or generate proceeds that are invested locally or moved across the borders.<sup>817</sup> A concern is raised about the lack of prudence in the investment of public fund, particularly foreign investment originating from illegal sources that take advantage of East African countries' favourable investment policies, to launder money.<sup>818</sup>

Kenya is ranked number one in money laundering in East Africa, followed by Uganda, Tanzania and Rwanda.<sup>819</sup> Being the financial hub of East Africa, its financial and banking sectors are the most sophisticated, with its banks expanding branches throughout East Africa. The United States Department of State's report indicates that Kenyan financial institutions engage in currency transactions related to international narcotics.<sup>820</sup> Kenyan companies, specifically a commercial bank (the Kenya Commercial Bank) and a petroleum and fuel multinational corporation (Dalbit), have also been recently linked to money laundering in South Sudan.<sup>821</sup> At least five major corruption cases in Kenya have come to light, in the last twelve years, involving abuse of public procurement, misappropriation of public funds, embezzlement and fraud of millions of dollars each.<sup>822</sup>

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<sup>814</sup> UNODC (2009). *Op.Cit.*, p.39.

<sup>815</sup> Mniwasa, E.E. (2004). *Op.Cit.*, p.51.

<sup>816</sup> *Ibid.*

<sup>817</sup> *Ibid.*

<sup>818</sup> UNODC.(2009) *Op.Cit.*, p.39.

<sup>819</sup> Masinde J. "US State Dept thinks Africa's leading mobile money platform is vulnerable to money laundering". *Quartz Africa*. 6 March 2017, at [www.qz.com/924977/us-state-dept-thinks-africas-leading-mobile-money-platform-is-vulnerable-to-money-laundering/](http://www.qz.com/924977/us-state-dept-thinks-africas-leading-mobile-money-platform-is-vulnerable-to-money-laundering/), accessed on 15 September 2017.

<sup>820</sup> United States Department of State. Money laundering and Financial Crimes. INCSR II (2017), p.116.

<sup>821</sup> The Sentry. (2016). *Op.Cit.*, p.41 and 43.

<sup>822</sup> Nyakachunga, V. "Top 5 Corruption Cases that Remain Unsolved in Kenya". *Kenyans.CO.KE*. 1<sup>st</sup> March 2016, at [www.kenyans.co.ke/news/top-5-corruption-cases-remain-unresolved-kenya](http://www.kenyans.co.ke/news/top-5-corruption-cases-remain-unresolved-kenya), accessed on 1<sup>st</sup> October 2017.

Tanzania is not an important regional financial centre but recent cases include the removal from office of several senior officials at the Tanzania Revenue Authority, including the Commissioner General, and the Director General of Tanzania Ports Authority, in November and December 2015 respectively, over allegations of corruption and tax evasion involving millions of dollars.<sup>823</sup> Other recent cases indicate a multimillion dollar corruption scandal in the energy sector involving a government minister and resulting in her removal from office in December 2014, thirteen accounts of money laundering against an advocate in August 2011, and US government's accusations of large scale money laundering against a Tanzanian bank, in July 2014.<sup>824</sup>

Uganda is not a financial regional centre but there is a belief that money laundering is widespread in the country. It is reported that British authorities identified several people possessing fake diplomatic passports from the Ugandan Department of Finance and laundering money in the UK.<sup>825</sup>

Rwanda too is not a major financial centre. An IMF assessment report indicates that there is no evidence that money laundering is a significant problem in Rwanda and points out a non-negligible risk of criminal proceeds generated both in Rwanda and in neighbouring countries being laundered in Rwanda.<sup>826</sup> Money laundering in Rwanda is essentially domestic in nature. It involves predicate offences such as embezzlement, illicit trafficking and corruption. What remains uninvestigated is the proceeds resulting from criminal actions.<sup>827</sup> There has not been any conviction for money laundering in Rwanda so far. Elsewhere in East Africa, the number of convictions is non-existent or low.<sup>828</sup>

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<sup>823</sup> Muvunyi, F. "Tanzania's Magufuli leads fight against corruption". DW. 12 May 2016, at [www.dw.com/en/tanzanias-magufuli-leads-fight-against-corruption](http://www.dw.com/en/tanzanias-magufuli-leads-fight-against-corruption), accessed on 1<sup>st</sup> October 2017.

Also, Ng'wanakilala, F. "Tanzanian President sacks port chief in anti-graft campaign" Reuters. 8<sup>th</sup> December 2015, at [www.reuters.com/article/ozatp-uk-tanzania-politics-](http://www.reuters.com/article/ozatp-uk-tanzania-politics-), accessed on 2<sup>nd</sup> October 2017.

<sup>824</sup> East African Community. (2015), *Op.Cit.*, p.21. Also, United States Department of State. Money laundering and Financial Crimes. INCSR II (2017), p.170.

<sup>825</sup> UNODC (2009). *Op.Cit.*, p.39.

<sup>826</sup> IMF Rwanda (2015). *Detailed Assessment Report –Anti-Money Laundering and Combating the Financing of terrorism.*, p.15.

<sup>827</sup> Dusabe, F. (2016). "Rwanda: Assessing the effectiveness of legal and policy responses to fight Money Laundering". *Journal of Money Laundering Control* 19(1), p.22.

<sup>828</sup> UNODC (2009). *Op.Cit.*, p.39.

There have been reports of money laundering in South Sudan involving political and military elites. Money laundering in South Sudan derives from systemic large-scale looting of the state coffers, trade in weapons, corruption, rent seeking, and abuse of position in connection with business activities in the oil and gas, mining, and financial sectors. Corruption is widespread in the oil rich world's newest state. The illicit proceeds are invested inside the country, for funding armed patronage networks, or offshore in neighbouring countries, especially Uganda, Kenya and Ethiopia<sup>829</sup>, or in distant countries such as Australia, often as real estate investments. The case of six individuals sanctioned by the UN and the United States for taking a role in the conflict in South Sudan has been documented by *The Sentry*.<sup>830</sup> The case of a particular Lieutenant General cited in the Sentry's reports, for example, indicates his direct involvement in the procurement of weapons, a wide range of commercial ventures, and numerous companies incorporated in South Sudan, including engineering and energy companies.<sup>831</sup> The General is also alleged to have received substantial payments from numerous multinational firms from at least three countries that operate in South Sudan, including Kenya, and millions of dollars through his personal bank account, including cash deposits and large payments from several international companies operating in SS, backed by Chinese, Lebanese and Turkish investors.<sup>832</sup> It is also reported, though not confirmed, that Somali nationals are involved in money laundering through foreign exchange bureaus in South Sudan.<sup>833</sup> Overall, South Sudan's economic and financial system is characterised by corruption and the flow of illicit funds, offshoring of assets by elites, large-scale abuse and mismanagement of the extractive industry, particularly oil; financial and trade-based fraud, the convergence of licit and illicit systems, disguised beneficial ownership, and regulatory evasion.<sup>834</sup>

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<sup>829</sup> The Sentry. Country Briefs: South Sudan. (2015), p.5.

<sup>830</sup> The Sentry is an initiative co-founded by George Clooney and investigating illegal money and the financing of mass atrocity crimes in Africa.

<sup>831</sup> The Sentry. War Crimes Shouldn't Pay (2016), p.43. Also, The Sentry. Making Fortune While Making a Famine. (2017), p.3.

<sup>832</sup> *Ibid.*

<sup>833</sup> US Department of State. Countries/ Jurisdictions of Primary Concern- Kenya, at [www.state.gov/j/inl/rls/nrcrpt/2015/vol2/](http://www.state.gov/j/inl/rls/nrcrpt/2015/vol2/), accessed on 3<sup>rd</sup> October 2017.

<sup>834</sup> KnowYourCountry. South Sudan, at [www.knowyourcountry.com/southsudan1111](http://www.knowyourcountry.com/southsudan1111), Consulted on 3<sup>rd</sup> October 2017.

The issue of dirty money earned through criminal activities also facilitates the financing of terrorism.

#### 4.5.4. Terrorism

Terrorism is a contested concept for which there is no universally accepted definition. Attempts at defining terrorism have produced many understandings of terrorism by scholars as well as national and regional policymakers. The academic literature often mentions a certain ‘academic consensus definition of terrorism’ proposed by Alex Schmid in 1988 and which he revisited later on. According to his “revised academic consensus definition of terrorism”, terrorism refers, on the one hand, to a doctrine about the presumed effectiveness of a special form or tactic of fear-generating, coercive political violence and, on the other hand, to a conspiratorial practice of calculated, demonstrative, direct violent action without legal or moral restraints, targeting mainly civilians and non-combatants, performed for its propagandistic and psychological effects on various audiences and conflict parties.<sup>835</sup> There is a general consensus, in the academic literature, that terrorism entails the intent to generate a wider psychological impact beyond the immediate victims. The psychological intent and the political motive are key to defining terrorism. These two elements are well captured in the following proposed simple definition: *Terrorism is the use of violence or the threat of violence with the primary purpose of generating a psychological impact beyond the immediate victims or object of attack for a political motive.*<sup>836</sup>

In Africa, the definition of ‘terrorist act’ in the Convention on the Prevention and Combating of Terrorism, the Algiers Convention, adopted by the Organisation of African Union in July 1999, serves as the blueprint for domestic anti-terrorism laws on the continent.<sup>837</sup> The EAC Protocol on Peace and Security adopted the same definition as in the Algiers Convention. Article 1 of the Protocol reads as follows:

*terrorism” means:*

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<sup>835</sup> Schmid, A. P. (2012). “The Revised Academic Consensus Definition of Terrorism”. *Perspectives on Terrorism* 6(2), p.158.

<sup>836</sup> Richards, A. (2014). “Conceptualising Terrorism”. *Studies in Conflict & Terrorism*. 37, p.213.

<sup>837</sup> Hübschle, A. (2011). From Theory to Practice: Exploring the Organised Crime-Terror Nexus in Sub-Saharan Africa. *Perspectives on Terrorism* 5(3-4), p.82.



*(a) any act which is a violation of the criminal laws of a Partner State and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any member or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:*

*(i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment of any of these, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or*

*(ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency or create general insurrection in a Partner State;*

*(b) any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organising, or procurement of any person, with the intent to commit any act referred to in paragraph (a)(i) and (ii);*

The rise of transnational organised crime and the changing nature of terrorism have caused scholars to suggest a convergence between the two phenomena.<sup>838</sup> They are distinct despite their overlaps and similarities.<sup>839</sup> It is established that not only transnational organised crimes substantially contribute to terrorism financing, terrorism too has increasingly become transnational. The emergence of transnational terrorism is associated with *Al-Qaeda* terrorism style.<sup>840</sup> The *Sunni* Islamist multi-national organisation was responsible of the twin bomb attacks on US embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, on 7<sup>th</sup> August 1998, killing 213 and 11 people respectively. Bombers of an *Al Qaeda* East Africa cell were helped by members of

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<sup>838</sup> Hübschle, A. (2011). *Op.Cit.*, p.81.

<sup>839</sup> Bobic, M. (2014). "Transnational Organised Crime and Terrorism: Nexus needing a human security framework". *Global crime* 15(3-4), p.247.

<sup>840</sup> Schneider F and R. Caruso (2011). "The (Hidden) Financial Flows of Terrorist and Transnational Crime Organisations: A Literature Review and Some Preliminary Empirical Results." *Economics Security Working Paper* 52, p.2.

*Al Shabaab*, the Somali dominated Islamist group who has been responsible for many terrorism attacks in East Africa.

*Al Shabaab*, “the Youth” in Arabic, was established in approximately 2004, as a radical wing of Somali’s now-defunct Union of Islamic Courts.<sup>841</sup> Its existence became public in 2006 when the Union of Islamic Courts took control of Mogadishu. *Al Shabaab* swore *bayat*, a loyalty oath, to Al Qaeda in 2012.<sup>842</sup> It has recruited significant numbers of foreign combatants in Kenya, Tanzania and other east African countries.<sup>843</sup> It has now emerged as a transnational terrorist group which operations expands beyond Somalia where it seeks to impose *Sharia* law. *Al Shabaab* is now becoming a more mobile, networked regional presence, whose growing reach along the African coast is providing valuable new sources of funding and recruits.<sup>844</sup> If most of its operations outside Somalia focused on Kenya for a while, it has also carried limited attacks in Tanzania and Uganda. *Al Shabaab* threatens to attack Kenya, Uganda and Burundi for their participation in the AMISOM. The suicide bomber attack that killed 76 people in Uganda, in July 2010, represents the first of a series of *Al Shabaab* serious incidents in the region. Other major attacks include the siege of the wealthy Westgate shopping mall in Nairobi, in September 2013, where *Al Shabaab* operatives killed 68 people and wounded 175 more; and the attack on Garissa University, in April 2015, the worst single terrorist in Kenya since the 1998 bombing of the US Embassy in Nairobi, with 147 victims mostly student. The coastal and northern Kenyan counties near the border with Somalia, especially Mandera, Garissa and Lamu, have recently particularly suffered attacks. 45 incidents reportedly left 70 people dead and 79 injured, in 2014.<sup>845</sup> 14 people were killed in

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<sup>841</sup> Haenlein, C. “How severe is the terror or threat in East Africa?” BBC Africa. 20 July 2015, at [www.bbc.co.uk/news/world-africa](http://www.bbc.co.uk/news/world-africa), accessed on 4 October 2017.

<sup>842</sup> LeSage, A. (2014). “The Rising Terrorist Threat in Tanzania: Domestic Islamist Militancy and Regional Threats. *Strategic Forum* 288, p.10.

Dearden, L. “Isis: New terrorist group Jahba East Africa pledges allegiance to ‘Islamic State’ in Somalia” Independent. 8 April 2016, at [www.independent.co.uk/news/world/africa/isis-new-terrorist-group-jahba-east-africa-pledges-allegiance-to-islamic-state-in-somalia](http://www.independent.co.uk/news/world/africa/isis-new-terrorist-group-jahba-east-africa-pledges-allegiance-to-islamic-state-in-somalia), accessed on 4 October 2017.

<sup>843</sup> *Ibid.*

<sup>844</sup> Haenlein, C. “How severe is the terror or threat in East Africa?”. *Op.Cit.*

<sup>845</sup> East Africa: Kenya Sees Progress in Counter-Terrorism Amid Reduced Attacks. All Africa. 18 January 2017, at [www.allafrica.com/stories](http://www.allafrica.com/stories), accessed on 4 Oct 2017.

presumed *Al Shabaab* attacks in July 2015, and 5 people in a firebomb attack on a vehicle, in Mandera and Lamu counties respectively.<sup>846</sup>

Whilst the main terrorism threat in East Africa has been *Al Shabaab*, an *Al Qaeda* affiliated organisation, a new jihadist group called *Jahba* East Africa announced its formation and its allegiance to the Islamic State of Iraq and the Levant, in April 2016.<sup>847</sup> The group is officially comprised of militants fighting in Somalia, including Kenyans, Tanzanians and Ugandans.<sup>848</sup> Reports indicate tensions within *Al Shabaab*, opposing traditionalists who favour a focus on Somalia, and internationalists who see the group as a transnational *jihadist* organisation.<sup>849</sup> The creation of *Jahba* East Africa, a pro ISIS faction, is seen as a resulting from the internal disputes between supporters of ISIS and *Al Qaeda* within *Al Shabaab*.<sup>850</sup> There have been reports of many more *Al Shabaab* affiliated Islamist groups, including *Al Hijra* in Kenya, *Ansar* Muslim Centre in Tanzania (*Tanga*), and *Uamsho* in Zanzibar. *Al Hijra* has been blamed for a long series of small-scale attacks since 2011 in Kenya's main cities of Nairobi and Mombasa, including grenade attacks, rudimentary improvised explosive device attacks, targeted killings of moderate preachers and security personnel, and attacks on churches and sporting events.<sup>851</sup>

The US Department of State affirms that terrorism is a growing concern in Tanzania.<sup>852</sup> In particular, the rise of violent Islamist attacks targeting local Christian leaders, churches, bars and restaurants have tarnished the country's reputation for peace and stability. LeSage lists at least 18 Islamist attacks throughout Tanzania between October 2012 and July 2014, including acid attacks, explosives, hand grenade and homemade petrol bomb attacks, beheading and burning against Catholic priests, churches, local residents, the police and moderate Muslim clerics.<sup>853</sup>

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<sup>846</sup> US Department of State. Country Reports on Terrorism 2015, p.30.

<sup>847</sup> DeFreese, M. "New Fronts Emerge in Africa's "Arc of Terrorism". Huffpost. 5<sup>th</sup> August 2016, at [https://www.huffpost.com/entry/new-fronts-emerge-in-afri\\_b\\_9865112](https://www.huffpost.com/entry/new-fronts-emerge-in-afri_b_9865112), accessed on 4 October 2017.

<sup>848</sup> Dearden, L. "Isis: New terrorist group Jahba East Africa pledges allegiance to 'Islamic State' in Somalia" Independent. 8 April 2016, at [www.independent.co.uk/news/world/africa/isis-new-terrorist-group-jahba-east-africa-pledges-allegiance-to-islamic-state-in-somalia](http://www.independent.co.uk/news/world/africa/isis-new-terrorist-group-jahba-east-africa-pledges-allegiance-to-islamic-state-in-somalia), accessed on 4 October 2017.

<sup>849</sup> Haenlein, C. *Op.Cit.*

<sup>850</sup> Dearden, L., *Op.Cit.*

<sup>851</sup> LeSage, A. (2014). *Op.Cit.*, p11.

<sup>852</sup> United States Department of State. Tanzania 2016 Crime & Safety Report, at [www.osac.gov/pages/ContentReportDetails.aspx?cid=19739](http://www.osac.gov/pages/ContentReportDetails.aspx?cid=19739), accessed on 4 Oct 2017.

<sup>853</sup> LeSage, A. (2014). *Op.Cit.*, p.6.

Despite an increased frequency of *Al Qaeda* offshoot's terrorism incidents in various parts of Tanzania, they have largely been unreported in international media<sup>854</sup>, except the first acid attack against foreign tourists, namely two young British women, in 2012 in Stone Town, Zanzibar.<sup>855</sup>

In Uganda, two insurgent groups, the Lord's Resistance Army and the Allied Democratic Forces are said to have crossed the line into terrorism. The LRA, founded in 1987, has notoriously carried out attacks against civilians through massacres, abductions, mutilations, sexual enslavement, brutal indoctrination including forcing recruits, mainly women and children, to burn homes, kill, loot and rape.<sup>856</sup> The LRA was listed as a terrorist group by the US in 2001, though it has since been removed from the list of designated terrorist groups. The African Union declared the LRA a terrorist organisation.<sup>857</sup> The group is now spread across the DRC, Central African Republic and South Sudan. The ADF operates from Eastern DRC, committing atrocities against the people of western Uganda and eastern DRC—raiding and burning down schools and villages, and killing innocent people indiscriminately, clandestinely planting improvised explosive devices in commuter taxis, buses, bars, and busy streets, and abducting and ruthlessly killing civilians who refused to cooperate with them.<sup>858</sup>

#### 4.5.5. Environmental crimes

Environmental crimes in East Africa take the form of wildlife poaching –the killing of wildlife in contravention of national and international law- and the smuggling and illegal trade in biodiversity products, especially elephant's ivory and rhino's horns. Other animals such as lions, buffalos and leopards are targeted too.<sup>859</sup> Although the fauna, specifically wild animals, is most affected, natural resources illegally taken from East Africa include flora and timber too.<sup>860</sup> Environmental crimes are dealt with in reference to the following international instruments whose primary purpose is the protection of the environment: the 1973 CITES, the 1987 Montreal

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<sup>854</sup> DeFreese, M. *Op.Cit.*

<sup>855</sup> LeSage, A. (2014). *Op.Cit.*, p.5.

<sup>856</sup> African Union Peace and Security. The African Union-Led Regional Task Force for the elimination of the LRA, at [www.peaceau.org/en/page/100-au-led-rci-lra-1](http://www.peaceau.org/en/page/100-au-led-rci-lra-1), accessed on 9 October 2017.

<sup>857</sup> *Ibid.*

<sup>858</sup> Munyua, D. (2012). "Combating Terrorism: A Ugandan Perspective". *Combative Terrorism Exchange CTX* 2(1).

<sup>859</sup> East African Community. (2015) *Op.Cit.* p.25.

<sup>860</sup> Ubwani, Z. "Poaching Poses Security Threat in East Africa. The Citizen. 13<sup>th</sup> September 2016, at [www.thecitizen.co.tz/News/Poaching-poses-security-threat-in-E-Africa--report](http://www.thecitizen.co.tz/News/Poaching-poses-security-threat-in-E-Africa--report), accessed on 10 Oct 2017.

Protocol on Substances that Deplete the Ozone Layer, and the 1989 Basel Convention on the Control of Transboundary movements of hazardous Waste and their Disposal.

Poaching is said to be on the rise in East Africa.<sup>861</sup> Various reports indicate an escalation of wildlife poaching and trafficking in the region in the last two decades, after a relative increase in the elephants populations that resulted from the ban on international trade in ivory imposed by the CITES in 1989. The resurgence of poaching in East Africa is attributed to the rising demand and price for wildlife, especially elephant's ivory and rhino's horn in the Asian market and China in particular, the proliferation of small arms and light weapons, porous borders, weak governance and corruption, poor management of natural resources, low income, widespread poverty and endemic resource-based conflicts among communities, flaws in the criminal justice systems and weak environmental legislations.<sup>862</sup> Environmental crime has a profound effect on the East African region. It poses a security threat in the region and disrupts societies. It devastates the ecosystems too and threatens the extinction of endangered species. Wildlife crime hinders sustainable development and impacts on tourism trade which represents a key part of many national economies. The Serengeti National Park in Tanzania and its ecosystem extending to Maasai-Mara in Kenya is said to be the most affected area in East Africa.<sup>863</sup>

Environmental crime in East Africa is becoming increasingly organised and transnational and one of the most significant areas of trans-border criminality.<sup>864</sup> Transnational environmental crime has been recognised as the fastest growing area of organised crime globally,<sup>865</sup> specifically, the

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<sup>861</sup> East African Community. (2015). *Op.Cit.*, p.23.

<sup>862</sup> TRAFFIC. Sophisticated poachers could undercut bold Kenyan fight against wildlife crime in this key African transit country, at [www.traffic.org/home/2016/5/9/sophisticated-poachers-could-undercut-bold-kenyan-fight-again.html](http://www.traffic.org/home/2016/5/9/sophisticated-poachers-could-undercut-bold-kenyan-fight-again.html), accessed on 10 October 2017.

Fighting Wildlife Trade in Kenya. UN Chronicle. LI No. (2). September 2014, at [www.unchronicle.un.org/article/fighting-wildlife-trade-kenya](http://www.unchronicle.un.org/article/fighting-wildlife-trade-kenya), accessed on 10 October 2017.

Ubwani, Z. "Poaching Poses Security Threat in East Africa. *Op.Cit.*

UNODC. Eastern Africa: UNODC to address rising environmental crime. 20 November 2009, at [www.unodc.org/unodc/en/frontpage/2009/November/eastern-africa\\_unodc-to-address-rising-environmental-crime](http://www.unodc.org/unodc/en/frontpage/2009/November/eastern-africa_unodc-to-address-rising-environmental-crime), accessed on 10 Oct 2017.

UNODC. Environmental crime: trafficking in wildlife and timber, at [www.unodc.org/toc/en/crimes/environmental-crime](http://www.unodc.org/toc/en/crimes/environmental-crime), accessed on 10 Oct 2017.

<sup>863</sup> Ubwani, Z. "Poaching Poses Security Threat in East Africa. *Op.Cit.*

<sup>864</sup> UNODC. Eastern Africa: UNODC to address rising environmental crime. 20 November 2009. *Op.Cit.*

<sup>865</sup> Elliot, L. (2012). "Fighting transnational environmental crime". *Journal of International Affairs*. 66(1), p.88.

transnational criminality involving large-scale exploitation and the theft of natural resources or transnational illegal wildlife trade.<sup>866</sup> Transnational environmental crime in East Africa involves increasingly sophisticated networks linked to organised crime.<sup>867</sup> Local poachers in pastoral areas including protected and unprotected areas work in tandem with well-connected and organised gangs and transnational criminal networks operating in multiple countries, to move the wildlife trophies in the illicit markets overseas.<sup>868</sup> This is corroborated by large-scale seizures, in Asian countries, of illegal wildlife products originating from East Africa. Examples include the seizure in Thailand, in July 2012, of nearly half a tonne of ivory worth more than \$700,000 and 3 tonnes of Kenyan ivory in April 2015, and the confiscation in May 2015, by Singaporean customs, of 3.7 tonnes of Kenyan illegal ivory worth \$60 million.<sup>869</sup> The greater role of transnational criminal syndicates in the ivory trade is associated with the increase of foreign nationals from end-user markets in Africa, and in East Africa indeed, specifically Asian nationals and Chinese in particular.<sup>870</sup> Chinese nationals and increasingly East African nationals are playing a crucial role in the ivory supply chain.<sup>871</sup> Three Chinese citizens were arrested at Jomo Kenyatta International Airport in Nairobi, on 3<sup>rd</sup> April 2016, with worked ivory bangles, lion teeth and pieces of ivory, the latter concealed in cooking foil and a condom.<sup>872</sup> A Vietnamese national too, was arrested at Jomo Kenyatta Airport on 15 May 2015, in transit from Maputo (Mozambique) to Hanoi, with seven rhino horns, rhino tails and 1,2kg of lion teeth and claws.<sup>873</sup> In Tanzania, four Chinese nationals whose passports showed that they had travelled frequently to Mozambique and Malawi were arrested in Mbeya, on 5 November 2-15, with 11 rhino horns.<sup>874</sup>

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<sup>866</sup> Warchol, G. (2004). "The Transnational Illegal Wildlife Trade". *Criminal Justice Studies* 17(1), p.57.

<sup>867</sup> TRAFFIC. Sophisticated poachers could undercut bold Kenyan fight against wildlife crime in this key African transit country, *Op.Cit.*

<sup>868</sup> Ubwani, Z. "Poaching Poses Security Threat in East Africa. *Op.Cit.*

<sup>869</sup> East African Community (2015). *Op.Cit.*, p.24.

<sup>870</sup> Gossman, A. (2009). "Tusks and trinkets: An overview of illicit ivory trafficking in Africa". *African Security Review*, 18(4), p.53.

<sup>871</sup> Brennan, A.J. and J.K. Kalsi (2015). "Elephants poaching & ivory trafficking problems in Sub-Saharan Africa: An application of O'Hara's principles of political economy". *Ecological Economics* 120, p.326.

<sup>872</sup> The Global Initiative Against Transnational Organised Crime (2016). *Beyond the Borders: Crime, conservation and criminal networks in the illicit rhino horn trade*, p.30.

<sup>873</sup> *Ibid.*

<sup>874</sup> *Ibid.*

Tanzania, Uganda and Kenya contribute over three-quarters of East Africa's transactions of large raw ivory.<sup>875</sup> A report of the Secretariat of the CITES indicate that the three countries accounted for eighty per cent (80%) of large seizures of ivory shipments in Africa, in 2013.<sup>876</sup> The report also points out that large-scale seizures, defined as 500Kg or more of raw or worked ivory seized at a single time, are indicative of the presence of organised crime in the illicit ivory trade.<sup>877</sup>

Tanzania and Kenya constitute key exit points for ivory leaving Africa while Uganda is a regional *entrepôt* for ivory originating in Central Africa.<sup>878</sup> Kenya has been identified as a source for wildlife commodities and a transit and exit point for illegally traded wildlife products from other countries including Mozambique, Uganda, the DRC, and Zambia and South Sudan.<sup>879</sup> As a major hub in East Africa for the smuggling of products by sea, the port of Mombasa represents a major transit route for elephant's tusks from Africa, counting for over 10 tonnes of illegal ivory intercepted between January and October 2013.<sup>880</sup> In Uganda, an audit by the wildlife authority in 2014 revealed the disappearance of about 1,300 Kg of ivory worth \$1.1 million.<sup>881</sup> Tonnes of illegal wildlife worth millions dollars, including ivory, rhino's horns and pangolin skins have been intercepted at Entebbe international airport too, between 2013 and 2015.<sup>882</sup> An incidence worth mentioning is a high court judge's order, in Uganda, to release a cargo of 2.9 tonnes of ivory that entered the country fraudulently declared as coffee for export, a ruling that was described as seriously undermining the ability of Uganda's legal system to impose law and order and deter criminals.<sup>883</sup> About 4 tonnes of illicit ivory were confiscated by Ugandan authorities between 2014 and

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<sup>875</sup> Underwood, F.M., Robert, W.B. and T. Milliken (2013). "Dissecting the Illegal Ivory Trade: An Analysis of Ivory Seizures Data". *PLOS One* 8(10), p.5.

<sup>876</sup> CITES (2014). Elephant conservation, illegal killing and ivory trade., p.29.

<sup>877</sup> *Ibid.*, p.28.

<sup>878</sup> Underwood, F.M., Robert, W.B. and T. Milliken (2013). *Op.Cit.*, p.5.

<sup>879</sup> TRAFFIC. Sophisticated poachers could undercut bold Kenyan fight against wildlife crime in this key African transit country. *Op.Cit.*

<sup>880</sup> Ubwani, Z. "Poaching Poses Security Threat in East Africa. *Op.Cit.*

<sup>881</sup> East African Community. Study to assess transnational organised crime and terrorism in the EAC region. (2015), p.25

<sup>882</sup> *Ibid.*

<sup>883</sup> Traffic. Uganda to return 2.9 tonnes of impounded ivory to ivory trafficking suspects. 27 July 2014. [www.traffic.org/home/2014/2/27/uganda-to-return-29-tonnes-of-impounded-ivory-to-ivory-traff.html](http://www.traffic.org/home/2014/2/27/uganda-to-return-29-tonnes-of-impounded-ivory-to-ivory-traff.html), accessed on 10 October 2017.

2015.<sup>884</sup> A haul of more than a tonne of ivory suspected to originate from the DRC or Tanzania (chopped into small pieces and treated to prevent it being detected) was seized in Kampala in February 2017, leading to the arrest of a Liberian and two Guinea Bissau nationals.<sup>885</sup>

The Ivory trade is said to be on rise in Rwanda.<sup>886</sup> Ten suspects including six Rwandan nationals and four foreign nationals from Guinea Conakry were arrested in Kigali, on transit to Asia, with 80Kg of partially processed ivory.<sup>887</sup> In March of the same year, three Guineans and a Rwandan were sentenced to six years imprisonment after they pleaded guilty to trafficking about 88Kg of ivory.<sup>888</sup>

### Conclusion

This chapter focuses on transnational crimes, meaning crimes that transcend the borders of the EAC. The reports that inform the chapter reveal other organised crimes such as racketeering, motorcycle theft, and cattle rustling, which, in my opinion, are largely not transnational, rather domestic crimes over which states have exclusive jurisdiction and do not require international cooperation. Hence, they were not considered in this chapter, as were other transnational crimes too, such as piracy, computer crime, trade and smuggling of small arms and light weapons and illicit trade in counterfeits and other illegal commodity, not considered for the sake of limiting the scope of this chapter and the thesis.

The commissioning by the EAC of a report, in 2015, to find out the extent and nature of transnational crimes in the region, arguably, suggests a serious security concern over the crimes. Despite the dearth of reliable data, in particular on South Sudan, the youngest world country and the newest member of the EAC, data reported on the rest of the Community are sufficient to establish that the threat of transnational crime in the EAC is considerable and needs to be

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<sup>884</sup> Ainebyoona, E. "Uganda confiscates 4,000 kgs of ivory as trafficking increases". Daily Monitor. 6 March 2016. [www.monitor.co.ug/Business/Markets/Uganda-confiscates-4-000-kgs-of-ivory-as-trafficking-increases](http://www.monitor.co.ug/Business/Markets/Uganda-confiscates-4-000-kgs-of-ivory-as-trafficking-increases), accessed on 10 October 2017.

<sup>885</sup> Ugandan authorities seize a tonne of ivory. New Vision. 21<sup>st</sup> February 2017, at [www.newvision.co.ug/new\\_vision/news/1446682/ugandan-authorities-seize-tonne-ivory](http://www.newvision.co.ug/new_vision/news/1446682/ugandan-authorities-seize-tonne-ivory), accessed on 10<sup>th</sup> October 2017.

<sup>886</sup> UNODC (2009). *Op.Cit.*, p.34.

<sup>887</sup> Police arrest 10 over ivory trade. The New Times. The New Times. 20 August 2016, at [www.newtimes.co.rw/section/read/202770/](http://www.newtimes.co.rw/section/read/202770/), accessed on 13 October 2017.

<sup>888</sup> *Ibid.*



addressed systematically, if the new EAC survives and if regionalism is taken seriously, not just trade but crime too, for peace and security. Cooperation in criminal matters in the EAC is therefore required. To what extent can the EAC cooperate in criminal matters and how can the Community effectively handle transnational crime is discussed in the next chapter.

## 5. A COOPERATION MODEL FOR THE EAST AFRICAN COMMUNITY

### Introduction

This chapter examines the reasons transnational crime has not yet translated into a meaningful action in the EAC despite growing concerns at both national and regional levels. It attributes the lack of concrete response to transnational crime in the EAC to the Partner States' tendency to view transnational crime through national lenses and their failure to understand that effective fight against transnational crime requires joint efforts. The chapter advances that the EAC Partner States must view transnational crime as a regional problem that calls for regional solutions. It claims that the EAC' policies, particularly the relaxation of borders, facilitate transnational crime and, as such, engage the Community's duty to protect. The chapter argues that bilateralism is irrelevant for fighting transnational crime in the EAC. It proposes multilateralism as a more suitable approach.

The chapter discusses two cooperation systems as applied in the EU, the MLA and the MR, and it assesses their strengths and weaknesses. It argues that MLA in the EU, which is essentially based on intergovernmentalism, proved inefficient, too bureaucratic, slow and cumbersome, therefore unsuitable in the context of regional integration. Further, the chapter argues that MLA had in mind domestic crimes, not transnational crimes. The chapter views MR as convenient for streamlining cooperation in criminal matters in the EAC. It argues that MR will judicialize cooperation in criminal matters in the EAC and enable direct contacts between competent authorities, unlike MLA politically handled and diplomatically channeled cooperation. The chapter considers MR as a modern cooperation system capable to adapt to technological pressures in view of the increased mobility of transnational criminal networks and the need to secure quick assistance in the arrest and extradition of suspects and accused for trial, or the provision of evidence or measures such as the confiscation of proceeds of crimes.

The chapter proposes the adoption, in the EAC, of an arrest warrant and an evidence warrant similar to the EAW and the EIO created in the EU and based on MR. It examines the tension between MR and human rights, in light of the abolition, in the EU' s mechanisms above, of principles such as dual criminality, political offence and nationality exception traditionally viewed

as the expression of states' protection of their citizens against foreign powers. Building on criticisms against the two mechanisms for failing to provide adequate protection of human rights, the chapter argues that care should be given to specific rights that are at risk in the mechanisms, should the EAC adopt them. The chapter advances that the scope of the two mechanisms should be limited to a set of defined transnational crimes, not other minor offences, to avoid their misuse in the national legal systems. It also advances that the jurisdiction *ratione personae* for the two mechanisms should be restricted to judicial authorities, to guarantee the protection of the rights of those affected.

The chapter traces the institutional development of cooperation in criminal matters in the EU, to understand the impact both MLA and MR have had on it. It argues that the shift towards MR in the EU led to the creation of institutions with more supranational character as intergovernmentalism in cooperation in criminal matters became untenable. The chapter recommends the creation of a regional police and an agency for criminal justice in the EAC, inspired respectively by Europol and Eurojust in the EU. It argues that the traditional state embedded policing is inappropriate for fighting transnational crime effectively. It views transnational policing as a logical response to the transnationalisation of crime in the EAC. The chapter also argues that the agency for criminal justice will ensure the coordination and implementation of the proposed mechanisms above, facilitate direct contacts between relevant authorities in the national criminal justices and preserve cooperation in criminal matters from political interference. Moreover, the chapter argues that the agency for criminal justice will be cost effective as a superstructure for all criminal justice actors and will prevent unnecessary multiplication of institutions.

The chapter considers the establishment of a transnational criminal justice in the EAC as an inevitable consequence of a certain transnationalisation of law, particularly criminal law, and the expansion of transnational crime. It examines the implications of transnational criminal justice as a burgeoning system with no agreed principles. It argues that in the absence of a unified body of transnational criminal law, harmonization of procedural and substantive laws will help achieve a convergence of national criminal justices and a more effective justice in the EAC as has been the case in the EU. The chapter discusses potential side effects of transnational criminal justice in

light of the protection against double jeopardy, *ne bis in idem*, as an essential principle in criminal law. It argues that the lack of a common standard for *ne bis in idem* as a principle originally developed to apply nationally puts individuals at risks of double jeopardy and may hinder the right to free movement in the EAC. It recommends the establishment of *ne bis in idem* as a constitutional legal principle and fundamental right in the EAC.

The chapter examines human rights issues in light of the contrast between transnational criminal justice as a system which enforcement is entirely domestic and its supranationalisation with mechanisms and institutions above the national level. It argues that the traditional human rights system cannot provide sufficient protection at the transnational level for the simple reason that it was not made to cope with the transnational aspects of crime. Further, it argues that transnational criminal justice in the EAC requires rethinking human rights anew and adopting a human rights statement that protects rights both at national and transnational level. The chapter argues that effective protection of rights in the EAC is a prerequisite for establishing cooperation in criminal matters.

#### 5.1. Rationale for cooperation in criminal matters in the EAC

The previous chapter 4 established, from various reports including a report commissioned by the EAC in 2015, that transnational crimes have considerably expanded in the EAC and in the wider Eastern Africa region and constitute a threat in the region. The mere fact that the EAC commissioned the report is arguably the evidence that the Community is concerned with the phenomenon. However, how far is the community concerned by the threat of transnational crimes is questionable not least because states often examine transnational crimes through national lenses, losing sight of the transnational dimensions of these crimes.<sup>889</sup> This is mainly the result of the national character long associated to criminal law as the exclusive competence of sovereign states. Understandably, cooperation in legal and judicial matters so far lags behind all

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<sup>889</sup> Coffey, G. (2013). "Resolving Conflicts of Jurisdiction in Criminal Proceedings: Interpreting *Ne Bis in Idem* in Conjunction with the Principle of Complementarity". *New Journal of European Criminal Law* 4(1-2), p.61-62. Also, Wennström, B. (2011). "In Search of a New lens". In: Bergstrom, M. and A.J. Cornell. (Eds.). *Interests and Actors in European police and Criminal Justice Cooperation*. Uppsala Faculty of Law Working Paper 2011:6c, p.27, 32.

other fields of interests defined in the EAC Treaty, and criminal matters perhaps totally ignored at the regional level, although the EAC is said to be very concerned by transnational crime.<sup>890</sup>

At present, the EAC's response to transnational crime consists of loose policy frameworks that essentially encourage inter-states cooperation, as opposed to a common approach through regional cooperation. For example, the EAC 2006 Strategy on Regional Peace and security calls the Partner States to adopt the UN Model Law on Mutual Assistance; the EAC 2013 Protocol on Peace and Security calls the Partner States to enact laws on MLA (Article 12(2)(f)); and the 2001 Protocol on Combating Illicit Drug Trafficking calls the Partner States to cooperate with each other to afford MLA (Article 5).<sup>891</sup> Whereas inter-states cooperation offers a solution at national level, the regional level is deprived of any solid mechanisms to fight transnational crimes yet the pervasive effects of transnational crimes are such as they transcend national borders and affect the whole region. The Partner States' affiliation to the EAC means that bilateral cooperation is irrelevant for an issue that affects the region, its interests and stability including peace and security. To quote the words of a respondent to the interviews for this research, 'bilateral arrangements are a vote of no confidence to the regional spirit'.<sup>892</sup> Although bilateral arrangements are regarded as practical as well as imposing robust enforcement obligations, they are often designed to suit the needs of the law enforcements on the basis of reciprocity.<sup>893</sup> Multilateralism must be the defining approach to cooperation in criminal matters in the EAC, for its emphasis on international law and its capacity to create norms and values.<sup>894</sup>

Cooperation in criminal matters cannot be left to the Partner States. The nature of transnational crimes and the existence of the EAC as a supranational entity require dealing with the crimes at the regional level rather than in terms of parochial bilateral arrangements which are limited to

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<sup>890</sup> Interview with respondent 6.

<sup>891</sup> The EAC wider policy framework on law and crime include the EAC Treaty, the Protocol in Defence Affairs, the Protocol on Foreign Policy Coordination, the Protocol on Good Governance, the Protocol on Preventing and Combating Corruption, the Conflict Prevention, Management and Resolution Mechanism, the EAC Early Warning mechanism, the Roadmap for the Operationalisation of the EAC Early Warning Mechanism and the EAC Peace Facility.

<sup>892</sup> Interview with Respondent 5.

<sup>893</sup> Harfield, C. (2003). "A Review Essay on Models of Mutual Legal Assistance: Political Perspectives on International Law Enforcement Cooperation Treaties". *International Journal of Comparative and Applied Criminal Justice*. 27(2), pp.229.

<sup>894</sup> Ibid., p.229-230.

the parties. Imagine a criminal network comprised of EAC nationals and other African and Asian nationals residing in different EAC states who are involved in the shipment of significant amounts of drugs in Kenya; the police in the EAC states recover substantive amounts of drugs from suspects associated with the network; search and seizure operations reveal the suspects have bank accounts scattered in the EAC Partner States; the police believe the money is the proceeds of the crimes. Although such a case sounds relatively uncomplicated, it involves complex issues that will require cooperation among the states to conduct investigations across the borders of the Partner States to secure evidences legally and to arrest and extradite suspects to stand trial in the Partner States. Furthermore, the case involves important questions, such as to determine which court has jurisdiction over the matter, since conflicts of jurisdiction will arise among the states. Bilateral arrangements will not totally solve the issues above. In addition, serious complications may occur where there is no bilateral treaty for the provision of assistance between the Partner States. Such case may result in a limbo.

Effective fight against transnational crimes requires the joint effort of states, a collective action rather than isolated efforts.<sup>895</sup> No state acting alone can effectively tackle transnational crimes.<sup>896</sup> In addition, the national law enforcements may not have sufficient skills and capacity to respond to the crimes. In some instances, transnational criminal networks may have access to more means than individual states. Technological advances in transport and communication means that criminal networks move rapidly across the borders and operate financial transactions faster and remotely, often with the ability to move and disguise their proceeds of crimes safely. The borders in the EAC are porous, giving the chance to criminals to roam around without the fear of any obstacles, to expand their criminal activities in the region, and to evade justice. Moreover, transnational criminal networks take advantage of the differences in the national legal systems to frustrate justice. It can be argued that the relaxation of borders in the EAC, specifically the freedom of movement in the Common Market, has encouraged the expansion of transnational crimes in the region. The establishment of the Common Market opens up a single

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<sup>895</sup> Coffey, G. (2013). *Op.Cit.*, p.61.

<sup>896</sup> See Parcalabu, D.D., Modiga, G. and G. Gurita (2011). "Importance and necessity of International Judicial Cooperation in Criminal Matters". *European Integration Realities and Perspectives. Legal Sciences*, p.172.

East African territory and a space in which various processes interact including crimes. Therefore, the EAC has the duty to protect its citizens against the abuse, by criminals, of the freedom of movement provided in the Common Market.

The expansion of transnational crimes in the EAC<sup>897</sup> and their potential pernicious effects on the integration efforts and on the security and welfare of the citizens require extending cooperation to criminal matters.<sup>898</sup> Crime is very key issue especially as the EAC moves towards political federation.<sup>899</sup> Specifically, transnational crime is causing a lot of damage in the Partner States.<sup>900</sup> There is correlation between levels of crime, security and development.<sup>901</sup> The EAC Common Market identifies crime as one of the bottlenecks for its implementation.<sup>902</sup> Cooperation in criminal matters is as much important as other areas<sup>903</sup> and it needs to be considered as priority,<sup>904</sup> especially in view of the EAC's ultimate goal for a federated region with a unitary government and a unitary political system.<sup>905</sup> The EAC needs to move from inward nationalistic approach to criminal matters, to an outward approach for the common good of the region.<sup>906</sup> It must thus extend cooperation to criminal matters as part and parcel of its portfolio, what has been referred to us as an 'integrated cooperation in all aspects'.<sup>907</sup>

A common policy in crime matters in the EAC needs due consideration and is critical for reducing undesired effects of transnational crimes in the region and consequent destabilization and damages to the economies.<sup>908</sup> This requires a change in the EAC's approach to crime matters and a move from inter-state bilateral arrangements to a multilateral regional response as did the EU, the OAS, the ECOWAS or the ASEAN.

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<sup>897</sup> See, EAC (2015). Study to assess transnational organised crime and terrorism in the EAC region, p.5

<sup>898</sup> On similar concern in the EU, see Ventrella, M. (2013). European integration or democracy disintegration in measures concerning police and judicial cooperation. *New Journal of European Criminal Law* 4(3), p.292.

<sup>899</sup> Interview with Respondent 1

<sup>900</sup> Interview with Respondent 2

<sup>901</sup> Interview with Respondent 1

<sup>902</sup> Interview with Respondent 3.

<sup>903</sup> Interview with Respondent 6

<sup>904</sup> Interview with Respondent 1

<sup>905</sup> Interview with Respondent 5.

<sup>906</sup> Interview with Respondent 1.

<sup>907</sup> *Ibid.*

<sup>908</sup> Interview with Respondent 2 and 4.

## 5.2. Existing models of cooperation: A quest for the EAC

International cooperation in criminal matters encompasses all measures taken in support of foreign criminal proceedings, by extending assistance to ensure the arrest and extradition of fugitive suspects or accused and the procurement and transmission of evidence between states.<sup>909</sup> While the international legal framework on cooperation in criminal matters<sup>910</sup> calls upon states to provide each other with assistance in the subject matters of the various global instruments, there has been a parallel development of regional initiatives to facilitate mutual assistance between states, in Europe, America, Southeast Asia and Africa. This section examines two different models of cooperation in criminal matters. The first model, MLA, emerged from the Council of Europe pioneering and innovative system that governed extradition and mutual assistance in criminal matters in the EU prior to the introduction of its own system. The second model, MR, was established by the EU later on.

### 5.2.1. Mutual legal assistance

The MLA model came about with the creation of the European Communities in 1957 and consequent need for joint efforts to combat crimes as a spillover effect of economic integration of the European States. The model aimed at facilitating cooperation while protecting states' sovereignty and the rights of individuals.<sup>911</sup> Two instruments adopted by the Council of Europe, the firsts of their kind, constitute this model. The European Convention on Extradition of 13 December 1957, entered into force on 18 April 1960 and the European Convention on Mutual Assistance in criminal matters of 20 April 1959, entered into force on 12 June 1962.<sup>912</sup>

The MLA model has great regard to states' sovereignty.<sup>913</sup> It is based on the principles of comity and reciprocity.<sup>914</sup> It involves a requesting state that sends a request to the requested state.

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<sup>909</sup> Meyer, F. (2008, 2010). Cooperation in Criminal Matters, p.1

<sup>910</sup> For example, the universal conventions against terrorism, the UN Conventions against Transnational Organised Crime and against Corruption.

<sup>911</sup> Mackarel, M. (2006). "Surrendering the Fugitive- The European Arrest Warrant and the United Kingdom". *The Journal of criminal Law* 71, p.365.

<sup>912</sup> Both conventions have been supplemented by additional protocols: Four additional protocols to the Convention on extradition (1975, 1978, 2010 and 2012) and two additional protocols to the Convention on Mutual Legal Assistance (1978 and 2001).

<sup>913</sup> Ruggeri, S. (2014). "Transnational Investigations and Prosecution of cross-Border Cases in Europe: Guidelines for a Model of Fair Multicultural Criminal Justice". In: Ruggeri, S. (Ed.). *Transnational Evidence and Multicultural Inquiries in Europe*. Springer. London, p.196, 201.

<sup>914</sup> Harfield, C. (2003). *Op.Cit.*, p.222 and 230.



Under this system, states are free to cooperate, and the requested state is generally not obliged to respond to the request made by the requesting state.<sup>915</sup> Article 2 of the Convention on Mutual Assistance provides that the requested state may refuse a request if it considers that execution of the request is likely to prejudice its sovereignty, security or *ordre public* or other essential interests. The states are free to define their essential interests and their decisions on requests are free of legal considerations; they are made on purely domestic policy. Also, if *ordre public* refers to most fundamental legal principles, its composition may differ from state to state.<sup>916</sup> In that respect, the MLA model is unpredictable.

One main characteristic of the MLA model is the role played by political authorities and the involvement of the executive power in the process. Requests for assistance and requests for extradition are sent through diplomatic channels. While the judicial authority examines the request, checks the requirements and confirms admissibility and legality<sup>917</sup>, the final decision whether or not to grant extradition is approved by the Executive authority.<sup>918</sup> The decision-making process is twofold with a government prong completing the judicial prong.<sup>919</sup> When asked what about the thesis' suggestion that the EAC becomes a legal area where cooperation is moved from national foreign affairs to the judiciary, a respondent said what matters is smooth cooperation and whether the change would expedite cooperation, add value and make a difference, before adding: "the problem is what challenges have we experienced by going to the ministry of foreign affairs...?".<sup>920</sup> The response can be found in the criticism made against the MLA model for being cumbersome, bureaucratic, inefficient and slow, with requests taking too long to be granted.<sup>921</sup> A similar opinion was put forward by a respondent to the interviews for

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<sup>915</sup> Schünemann, B. (2014). "Solution Models and Principles Governing the Transnational Evidence Gathering in the EU". In: Ruggeri, S. (Ed.). *Transnational Evidence and Multicultural Inquiries in Europe*. Springer. London, p.166.

<sup>916</sup> Meyer, F. (2008-2010). *Op.Cit.*, p.8.

<sup>917</sup> Bertrán de Felipe, M. and A. Nieto Martín (2012). "Post 9/11 Trends in International Judicial Cooperation". *Journal of International Criminal justice* 10, p.587.

<sup>918</sup> The role of the political authorities is less in assistance requests for evidence than in extradition. Usually, the competent authority approves the requests.

<sup>919</sup> Meyer, F. (2008-2010). *Op.Cit.*, p.8.

<sup>920</sup> Interview with Respondent 6.

<sup>921</sup> Vandeboek, E and F Verbruggen (2013). "The EU and the death penalty abolition: The limited prospects of judicial cooperation in criminal matters as an external policy tool". *New Journal of European Criminal Law* 4(4), p.488. Also, Meyer, F. (2008-2010). *Op.Cit.*, p.10.

this thesis, who described cooperation through diplomatic channels as too long, loose and lacking proper reprimand mechanism.<sup>922</sup> The MLA model does not establish time limits or strict deadlines for granting a request. Moreover, it does not establish any standard form in which the request shall be made. This lack of specific form in the MLA model causes a great challenge considering the complications of international cooperation in criminal matters, including foreign language difficulties and the differences in the legal systems. Furthermore, the MLA model gives the states the possibility to make declarations and reservations.<sup>923</sup> It provides for broad grounds for refusal, making the system uncertain.<sup>924</sup> For example, dual criminality, the requirement that an offence for which a request for assistance or for extradition is made must constitute an offense under the law of the requested state too, is a key feature of the MLA model. In extradition matters, the system imposes bars to requests, such as the political offence exception (the principle that a request shall not be granted if the crime is political by nature) and the nationality exception (or non-extradition of nationals).<sup>925</sup> Another exception in the MLA model is the specialty rule or the bar on further evidence transmission or extradition for offences committed prior to the request.<sup>926</sup> While these exceptions and bars are often seen as protecting the rights of individuals, they are also arguably symptomatic of the protection of states' sovereignty in the MLA model and a certain lack of flexibility and trust in foreign legal systems. The reason might be the post-war context of the emergence of the MLA model despite the adoption of the ECHR in 1953.

Traditionally, the principle in the MLA model has been that the applicable law is the law of the requested state, or *locus actum regit* (also *lex loci actus*).<sup>927</sup> The EU 2000 MLA Convention changed this fundamental rule and required the requested state to comply with the procedure and formalities indicated by the requesting state, unless compliance would be contrary to the

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<sup>922</sup> Interview with Respondent 5.

<sup>923</sup> Ibid., p.482.

<sup>924</sup> Meyer, F. (2008,2010). *Op.Cit.* p.10.

<sup>925</sup> Mann, G.J. (2007). "The European Arrest Warrant: A Short-Lived Mechanism for Extradition". *Syracuse Journal of International Law and Commerce* 34, p.718.

<sup>926</sup> Rackow, P. and C. Birr (2010). "Recent developments in legal assistance in criminal matters". *Goettingen Journal of International Law* 2(3), p.1091.

<sup>927</sup> Vermeulen, G. (2006). "A. EU conventions enhancing and updating traditional mechanisms for judicial cooperation in criminal matters". *ERES Revue Internationale de droit penal* 1(77), p.82.

fundamental principles of the requested state.<sup>928</sup> Nevertheless, the *locus actum regit* principle is another illustration that protection of sovereignty is fundamental in the MLA model. To the question “which law should apply in a request for assistance, whether the law of the requested state or that of the requesting state”, most of the respondents to the interviews for this thesis expressed a preference for *locus actum regit*. However, one respondent’s response suggested a preference for *locus fori* or the application of the law of the requesting state, in the following terms: “...say country A is pursuing a fugitive who is in country B. ... country B who the fugitive is living in should allow the legal regime of country A to pursue this fugitive, pick him and let him be tried in country A where the fugitive has committed offence. ... country B should be given liberty to exercise its legal jurisdiction”.<sup>929</sup> While the *locus actum regit* principle is understandable, it constitutes a serious obstacle to the admissibility of evidence obtained abroad, particularly where there are differences in the legal systems between the states involved. Arguably, the MLA model was made for legal systems that are similar. The respondents to the interviews for this thesis identified the divergences in national legal systems in the EAC as a challenge to cooperation in criminal matters in as far as they cause variations in how the Partner States handle their issues, specifically criminal matters, and a lack of trust between relevant national agencies.<sup>930</sup>

The MLA model was improved over the years to provide fast and more efficient assistance in the EU and to adapt to new investigation techniques. The 1990 CISA, incorporated in the legal framework of the EU by the Treaty of Amsterdam of 1997 (entered into force on 1<sup>st</sup> May 1999), reduced the grounds for refusal of a request for assistance.<sup>931</sup> It maintained the requirement for dual criminality for search and seizure orders<sup>932</sup> and removed it for all less invasive investigation measures. Also, the EU adopted the Convention on Simplified Procedures in Extradition in 1995

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<sup>928</sup> Article 4 (1) EU 2000 MLA Convention.

<sup>929</sup> Interview with Respondent 5.

<sup>930</sup> Interview with Respondent 1, 2 and 7.

<sup>931</sup> Rackow, P. and C. Birr (2010). *Op.Cit.*, p.1097.

<sup>932</sup> Article 51 EU 2000 MLA Convention

and the Convention on Extradition in 1996, both which unfortunately never entered into force for poor ratification.<sup>933</sup>

The MLA model is at best inappropriate for handling transnational crimes in the EAC. The system was conceived for national procedures with a transnational aspect in broad sense, such as national investigations requiring the collection of evidence abroad.<sup>934</sup> To use the words of Clive Harfield, transnational organised crimes as the phenomenon is understood today had yet to trouble policymakers.<sup>935</sup> As will be argued in further sections, transnational crimes need to be understood as distinct and different from national and international crimes. Even with some improvements as did the EU 2000 MLA Convention, to adapt to new investigation techniques, the MLA model failed to provide the efficiency required for granting assistance in investigation. The reason for the ineffectiveness of the MLA model is to be found in its philosophical principles, in particular the strong emphasis on sovereignty and consequent broad grounds for refusal. The move towards a regional supranational governance system in the EAC and its implications for ceding part of national sovereignty to the Community requires reconsidering criminal law not as exclusively a states' sovereign prerogative over their citizens but as a shared competence. In that respect, the MLA model appears outdated for enabling the provision of assistance with less possible formalities. Furthermore, the EAC's aspiration to political federation means the convergence of the governance systems of the Partner States towards a super-structure in which the differences will be kept to the minimum. The respondents to the interviews for this thesis emphasised the political federation aspiration of the EAC as a key factor for the determination of a suitable cooperation model, which, in the view of one respondent, would require "moving from nationalistic approach of view which is inward looking to outward looking where we see ourselves as one political federation".<sup>936</sup> Another respondent made a similar opinion: "One clear fact is that EAC's ultimate goal is to form a federated region with a unitary government and a unitary political system. ... I prefer a situation where the sovereign States can share their

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<sup>933</sup> Mackarel, M. (2006). *Op.Cit.*, p.364. Also, Mathisen, G. (2010). *Op.Cit.*, p.4.

<sup>934</sup> See Ruggeri, S. (2014), *Op.Cit.*, p.194.

<sup>935</sup> Harfield, C. (2003). *Op.Cit.*, p.222.

<sup>936</sup> Interview with Respondent 1.

sovereignty and come up with a unitary system that allows for all those that I've mentioned".<sup>937</sup> In the legal field and in criminal law in particular, the quest for a model of cooperation in the EAC needs to ensure a swift and frictionless arrest and handing of suspects, accused or convicted of transnational crimes between the Partner States and the collection, transmission and admissibility of evidence across the borders in the same conditions. Ensuring the admissibility of evidence gathered in a foreign State is the biggest challenge in international cooperation in criminal matters. This concern was expressed by a respondent to the interviews for this thesis in the following terms: "...say for example I think, I'm not wrong, Uganda which passed a bill which allows evidence taped message on the phone which can be used as evidence in court; in other countries it would be against their own laws, so how do you deal with this question...".<sup>938</sup> The admissibility of evidence gathered in a foreign State would need to be taken into account in the EAC as it progresses towards political federation and a unitary system where the legal systems of the Partner States will cease to be seen as foreign and will rather be part of an integrated governance.

The ever-closer cooperation and integration between the EU Member States after the signing of the Maastricht Treaty on the EU and the unprecedented technological advances in transport and communication compounded with the expansion of transnational crimes in the last quarter of the twentieth century spurred the need for a more efficient, flexible and fast cooperation system. Furthermore, the MLA model proved unable to overcome the differences in the legal systems and traditions of the Member States.<sup>939</sup> This situation resulted in a gradual shift from the MLA model to a system that removes unnecessary barriers to cooperation in criminal matters.

### 5.2.2. Mutual recognition

The MR principle in the EU was elaborated in criminal matters in June 1998 with the European Council of Cardiff and was further developed in 1999 at the Tampere European Council which qualified MR as the cornerstone of cooperation in both civil and criminal matters within the

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<sup>937</sup> Interview with Respondent 5.

<sup>938</sup> Interview with Respondent 7.

<sup>939</sup> See, Raffaelli, R. (2017). Judicial cooperation in criminal matters. Fact sheets on the European Union, p.2.

EU.<sup>940</sup> The principle originated from the internal market where it means that goods lawfully produced in a Member State should be allowed to move freely in other Member States without any barriers.<sup>941</sup> The Tampere Council of 1999 (in its conclusion 36) stated the importance of the MR principle in criminal matters as a way of transcending the limits of traditional judicial cooperation to facilitate the prosecution of crimes and to prevent impunity arising from some forms of criminality in a context of free movement of people and goods.<sup>942</sup>

The basic premise of MR is that decisions made by judicial authorities in a Member State take effect in the legal system of another Member State.<sup>943</sup> In the view of the Tampere Council, the MR principle was to apply to courts judgments and other decisions, especially those securing evidence as well as freezing orders.<sup>944</sup> The concept of MR is closely connected to the EU's objective to create 'an Area of Freedom, Security and Justice'<sup>945</sup> in accordance with Article 67(1) TFEU. The idea behind the Area of Freedom, Security, and Justice is that the territory of the Member States should constitute one single judicial space which legal pluralism is maintained and respected<sup>946</sup>, as further stated in Article 67(1) TFEU which stresses the 'respect for ... different legal systems and traditions of the Member States'.

MR is explicitly recognized by Article 82 TFEU which provides that 'judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83'. The principle is applied to both judgments and decisions taken in the pre-trial phase.<sup>947</sup> MR is not contingent upon harmonization

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<sup>940</sup> Alegre, S. and M. Leaf (2004). "Mutual Recognition in the European Judicial cooperation: A Step Too Far Too Soon? Case Study- the European Arrest Warrant". *European Law Journal* 10(2), p.200-1.

<sup>941</sup> Mancano, L. (2016). "The Right to Liberty in European Union Law and Mutual Recognition in Criminal Matters". *Cambridge Yearbook of European Legal Studies* 18, p.217.

<sup>942</sup> Roma Valdés, A. (2015). "The mutual recognition principle in criminal matters: a review". *ERA Forum* 16, p.292.

<sup>943</sup> Obokata, T. (2011). "Key EU principles to combat transnational organised crime". *Common Market Law Review* 48, p.809.

<sup>944</sup> Bonasera, J. (2017). "Brexit and the European Arrest Warrant: The United Kingdom's Chance to Curtail abuse of the Surrender System". *Arizona Journal of International and Comparative Law* 34(3), p.643

<sup>945</sup> Satzger, H. (2019). "Is mutual recognition a viable general path for cooperation?". *New Journal of European Criminal Law* 10(1), p.45.

<sup>946</sup> *Ibid.*

<sup>947</sup> Roma Valdés, A. (2015). *Op.Cit.*, p.292.

of national criminal laws and procedures.<sup>948</sup> Nothing in Title IV of the TEU makes the application of MR conditional upon harmonization of criminal laws of the Member States.<sup>949</sup> The aim of harmonisation is to eliminate differences while the differences are recognized under the MR principle.<sup>950</sup> MR operates despite the differences in national criminal laws and procedures.<sup>951</sup>

The conceptual centerpiece of the MR principle in criminal matters is mutual trust, the assumption that the legal systems of all Member States offer equivalent protection of individual rights and equal procedural guarantees.<sup>952</sup> MR implies that a judicial decision taken by a competent judicial authority of a Member State has to be executed in another Member State without any need for prior recognition, presuming that judgments to be recognized and enforced always comply with the principles of legality subsidiarity, and proportionality.<sup>953</sup> Therefore, a judgment made in the United Kingdom, e.g., should be recognized with less formalities possible in France or in another jurisdiction. However, critics described mutual trust as ‘a fiction’.<sup>954</sup> The assumption that Member States’ adherence to the ECHR made their legal systems equivalent in terms of fundamental rights protection attracted fierce criticisms based on the numerous judgements of the ECtHR on Member States’ violations of fundamental rights of individuals, especially the prohibition of torture and inhuman or degrading treatment, and fair trial guaranteed in Articles 3 and 6 ECHR, respectively.<sup>955</sup>

Unlike the EU, the EAC is deprived of any enforcement mechanism in human rights matters. While the EAC Treaty refers to the ACHPR as the benchmark or the bedrock in terms of human rights standard, as some respondents to the interviews for the thesis recalled,<sup>956</sup> none of the six EAC Partner States recognizes the competence of the ACtHPR to receive cases from individuals and

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<sup>948</sup> Obokata, T. (2017). “The Value of International Law in Combating Transnational Organised Crime in the Asia-Pacific”. *Asian Journal of International Law* 7, p.47.

<sup>949</sup> Obokata, T. (2011). *Op.Cit.*, p.810.

<sup>950</sup> *Ibid.*

<sup>951</sup> Obokata, T. (2017). *Op.Cit.*, p.47.

<sup>952</sup> Mancano, L. (2016). “The Right to Liberty in European Union Law and Mutual Recognition in Criminal Matters”. *Cambridge Yearbook of European Legal studies* 18, p.215.

<sup>953</sup> Roma Valdés, A. (2015). *Op.Cit.*, p.292.

<sup>954</sup> *Ibid.* Also, Bonasera, J. (2017). *Op.Cit.*, p.656.

<sup>955</sup> Heard, C. and D. Mansell (2011). “The European Arrest Warrant: The Role of Judges When Human Rights are at Risk”. *New Journal of European Criminal Law* 2(2), p.135.

<sup>956</sup> Interviews with Respondents 2 and 6.

NGOs (See section 5.4.3.). Furthermore, the EACJ too lacks an enforcement mechanism and it cannot impose compliance with its judgments (See section 3.3.3.6.). When asked whether there should be a test of compliance with human rights in cooperation in criminal matters or whether the EAC should just adopt the MR principle like did the EU, the respondents to the interviews for this thesis expressed a support for MR overall and emphasized compliance with human rights standards too, as the following quote reads: “Much of course you may want to come up with the issue of mutual recognition ..., human rights must measure international standards”.<sup>957</sup> Another respondent added: “... a mutual recognition of decisions would be the best way to do ... and this idea of mutual respect would actually deal with the issue of the fear for losing your sovereignty because what you are telling each other is that you’ll be relying to respect each and everyone’s decision...”.<sup>958</sup> To a further question on the extent to which it would be worth setting a human rights standard applicable in cooperation in criminal matters in the EAC, all respondents converged on the importance of the issue, recalling that human rights constitute a fundamental principle of the Community and a requirement for adherence to the EAC Treaty.<sup>959</sup> They expressed concerns about possible variations in national principles and standards and risks for abuse and injustice to citizens.<sup>960</sup> They also emphasised the need for the EAC to come up with internationally recognized human rights standards at the regional level.<sup>961</sup> Moreover, the respondents recognized the difficulty of the Partner States to agree on human rights standards for the EAC, which a respondent attributed to the delicate nature of the issue, and which the same respondent further said explains why the EACJ’s jurisdiction has not been extended to human rights yet.<sup>962</sup> Arguably, the same reason explains the persistent reluctance of the EAC to adopt its own human rights instrument (See section 5.4.3.).

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<sup>957</sup> Interview with Respondent 1.

<sup>958</sup> Interview with Respondent 7.

<sup>959</sup> Interviews with Respondents 1, 2, 3, 4, 5, 6, 7 and 8.

<sup>960</sup> Interviews with Respondents 1 and 5

<sup>961</sup> Interviews with Respondents 1, 3, 5 and 6.

<sup>962</sup> Interview with Respondent 3



The MR principle is not absolute or automatic.<sup>963</sup> It does not imply a strict, complete and blind positive acceptance of different national standards.<sup>964</sup> However, it introduced a high level of automaticity in cooperation in criminal matters in the EU.<sup>965</sup> Member States are to a great extent required to provide assistance, save where grounds for refusal apply. On the question whether a request for assistance should entail an obligation to the requested state or whether should the latter have a margin of appreciation to grant the request or not, there was a divided opinion among the respondents to the interviews for this thesis, with a clear majority in favour of an obligation to cooperate. Those in favour of an obligation to cooperate considered that the freedom of movement in the EAC commands establishing such an obligation to avoid the Community becoming a hub for fugitives.<sup>966</sup> A respondent added, in addition, that the defining criteria should be the magnitude of the crimes.<sup>967</sup> This particular aspect comes up in the next two sections on the application of MR to extradition and assistance in evidence. The respondents in favour of a certain margin of appreciation instead justified their view on the basis of protection of human rights. They expressed concerns about politically motivated prosecutions. E.g., a respondent said: "It might be that someone is pursued for political reasons in the disguise of a criminal offence, ... you should have a margin of appreciation to look at whether the request is obviously reasonable, appropriate...".<sup>968</sup> Another said: "The issue about appreciation will always be there. ... we should be cautious that we don't end up violating human rights."<sup>969</sup> However, one of those in favour of a margin of appreciation added that, in the spirit of cooperation, the requested state should explain the reason it does not grant a request and not simply put aside a request.<sup>970</sup>

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<sup>963</sup> See more, Suominen, A. (2014). "Limits of Mutual Recognition in Cooperation in Criminal Matters within the EU - Especially in Light of Recent Judgments of Both European Courts." *European Criminal Law Review* 4(3), p.215.

<sup>964</sup> Satzger, H. (2019). *Op.Cit.*, p.54.

<sup>965</sup> Mancano, L. (2018). "Mutual recognition in criminal matters, deprivation of liberty and the principle of proportionality. *Maastricht Journal of European and Comparative Law* 25(6), p.722.

<sup>966</sup> Interviews with Respondents 2, 3, 4 and 5.

<sup>967</sup> Interview with Respondent 1.

<sup>968</sup> Interview with Respondent 7.

<sup>969</sup> Interview with Respondent 6.

<sup>970</sup> Interview with Respondent 7.

The application of MR in criminal matters has been contested and praised in various studies. Opponents to the extension of MR to criminal matters argue that it produces a reverse effect than in the internal market where its use in decisions enabling business, trade and movement constrains the power of government agencies and conversely empowers the private sector; MR in cooperation in criminal matters allegedly benefits the law enforcement to the detriment of suspects and defendants.<sup>971</sup> On this issue, a respondent to the interviews for this thesis recalled the principle that the EAC is a people centred and private sector driven cooperation, as enshrined in Article 6 EAC Treaty, before adding: “this cooperation should not be seen from the political, the bureaucratic sense of it only... ..it’s a cooperation for East Africans, not East African governments”.<sup>972</sup> For proponents of MR, the principle grants extraterritorial effects to foreign legal decisions, transposing some degree of foreign legal elements into the domestic criminal justice<sup>973</sup> and facilitating integration in criminal matters.<sup>974</sup>

The MR is a very flexible concept and, under certain circumstances and conditions, a viable path for cooperation outside the EU too.<sup>975</sup> Given the differences in the legal traditions in the EAC, the principle may need additional complementary factors, e.g., the respect of a common set of fundamental rights in criminal procedures, to create an objective basis for mutual trust among the Partner States. While the adoption of MR and the extent of its application is a political decision, the principle resonates well with the EAC’s ultimate objective for establishing a political federation. If adopted in the EAC, MR will streamline the provision of assistance in criminal proceedings in the Community.

Like the MLA model, MR has been applied to extradition and assistance in evidence and introduced specific instruments that are adaptable to the EAC.

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<sup>971</sup> Marin, L. (2014). “Effective and Legitimate- Learning from the Lessons of 10 Years of Practice with the European Arrest Warrant”. *New Journal of European Criminal Law* 5(3), p.331.

<sup>972</sup> Interview with Respondent 6.

<sup>973</sup> Bonasera, J. (2017). *Op.Cit.*, p.644.

<sup>974</sup> Allegrezze, S. (2014). “Collecting Criminal Evidence Across the European Union: The European Investigation order Between Flexibility and Proportionality”. In: Ruggeri, S. (Ed.). *Transnational Evidence and Multicultural Inquiries in Europe*. Springer. London, p.55.

<sup>975</sup> Satzger, H. (2019). *Op.Cit.*, p.55.

### 5.2.2.1. *Mutual recognition and extradition*

The first concrete application of the principle of MR in criminal matters concerned the field of extradition though, strictly speaking, its first application was Article 54 CISA which the ECJ, in the combined case *Gözütok* and *Brügge*, conceived of as imposing mutual recognition of final decisions in criminal matters.<sup>976</sup>

EU Member States sought to replace the old extradition system by a mechanism that will ensure fewer or no grounds for refusal are required to mutually handing crime suspects and accused who might be staying in their respective territories. Consequently, on 13 June 2004, the Council of Ministers adopted the FD 2002/584/JHA on the EAW and the surrender procedures between the Member States. As Article 1(1) FD 2002/584/JHA indicates, the EAW was set up for ‘conducting a criminal prosecution or executing a custodial sentence or detention order’. It is a transnational legal instrument and law enforcement mechanism.<sup>977</sup> The EAW was introduced to tackle serious cross-border crimes such as terrorism and trafficking in human beings.<sup>978</sup> It was adopted against the backdrop of the terrorist attacks on the World Trade Centre, of 11 September 2001, which intensified European cooperation against transnational crime.<sup>979</sup> The aim of its adoption was to remedy the negative consequences of free movement of persons, combined with open borders, which entailed a real risk of unfettered actions of criminals.<sup>980</sup>

The stated purpose of the EAW is to simplify and expedite the extradition procedures between Member States of the EU.<sup>981</sup> The FD EAW applies several methods to achieve this end. Firstly, it replaces all previous extradition agreements between the Member States by a uniform surrender procedure<sup>982</sup> in which the same warrant is used for arresting the persons wanted for prosecution

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<sup>976</sup> Fletcher, M., Löff, R. and B. Gilmore (2008). *EU Criminal Law and Justice*. Edward Elgar Publishing Limited, Cheltenham, p.134.

<sup>977</sup> Marin, L. (2014). “Effective and Legitimate? Learning from the Lessons of 10 Years of Practice with the European Arrest Warrant”. *New Journal of European Criminal Law* 5(3), p.328 and 331.

<sup>978</sup> Heard, C. and D. Mansell (2011). *Op.Cit.*, p.134.

<sup>979</sup> Bonasera, J. *Op. Cit.*, p.644.

<sup>980</sup> Ostropolski, T. (2014). “The principle of proportionality under the European Arrest Warrant- With an excursus on Poland”. *New Journal of European Criminal Law* 5(2), p.168.

<sup>981</sup> Mann, G.J. (2007). *Op.Cit.*, 34, p.719.

<sup>982</sup> Nina Marlene Schallmoser (2014), The European Arrest Warrant and Fundamental Rights: Risks of Violation of Fundamental Rights through the EU Framework Decision in Light of the ECHR. *European Journal of Crime, Criminal Law & Criminal Justice* 22(2), p.136.

or for enforcement of custodial sentences, and for their transfer to the requesting state. The FD EAW replaces the diplomatic and political phase in the conventional extradition by a system totally controlled by the judiciary within an integrated transnational justice system.<sup>983</sup> The EAW issued by relevant 'judicial authorities' must be recognized as valid and enforced by the courts of other Member States. As a result, the FD EAW changes the terminology from 'requesting and requested states' in the old extradition system to 'issuing and executing states'.<sup>984</sup> Furthermore, the FD EAW establishes a general rule that the EAW must be treated as a matter of urgency.<sup>985</sup> It provides strict time limits to execute a warrant. A final decision on the execution of the EAW must be taken within 60 days, with a possible extension for 30 days; where a person consents to the surrender, the decision shall be taken within 10 days after the consent has been given (Article 17 FD EAW). Whether or not the person agrees to the surrender, he or she shall be surrendered no later than 10 days after the final decision to execute the EAW has been formally issued, unless serious humanitarian reasons apply. (Article 23 FD EAW).

Secondly, the FD EAW introduces significant changes in the extradition system. It reduces the grounds for refusal to extradite a person to a minimum core. The execution of the EAW shall be refused in case the offence for which it has been issued is covered by amnesty, or when a person has already been judged in respect of the same offence (*ne bis in idem*), or, lastly, where criminal liability age limits applies under the law of the executing state. (Article 3 FD EAW). The FD EAW excludes the nationality exception from the grounds for refusal. Member States cannot refuse to extradite their own nationals accused or suspected for committing a serious crime in another Member State. However, the FD EAW gives the option to Member States to request guarantee that, upon conviction, the individual is returned to serve the sentence to their home state. (Article 5(3) FD EAW). Member States do still have the power to avoid their nationals having to serve custodial sentence or detention in other Member States, if they undertake to execute the sentence or detention order imposed in the issuing State (Article 4(6) FD EAW).

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<sup>983</sup> Bonasera, J. (2017). *Op.Cit.*, p.644-645.

<sup>984</sup> Mackarel, M. (2006). *Op.Cit.*, p.366.

<sup>985</sup> Plachta, M. (2003). "European Arrest Warrant: Revolution in Extradition". *European Journal of Crime, Criminal law and Criminal Justice* 11(2), p.188.

The FD EAW removes the dual criminality exception for 32 generic types of offences<sup>986</sup> where they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years. For all other offences, the executing state may refuse surrender on the ground of absence of dual criminality. (Article 2(4) FD EAW). Ordinarily, the EAW may be issued for offences punishable under the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least twelve months or, where a sentence has been passed or a detention order has been made, for at least four months. (Article 2(1) FD EAW). The FD EAW provides for the possibility for waiving the principle of specialty too, to enable the prosecution or detention of a person concerned by the EAW, for an offence committed prior to the surrender. This deviation from the rule of specialty operates on condition that a Member States notifies its reciprocal consent to the General Secretariat of the Council. (Article 27(1) FD EAW).

The removal of dual criminality raised concerns in respect of the principles of legality and equality. It was challenged in *Advocaten de Wereld* for infringing legality, equality and non-discrimination.<sup>987</sup> In particular, the list of 32 types of offences was claimed to be superfluous, vague, lacking a definition of the offences, and therefore violating the principle of clarity.<sup>988</sup> It was alleged that the abolition of dual criminality for 32 types of offences potentially caused discrimination and unequal treatment of individuals wanted under the same warrant.<sup>989</sup> In the EAC, this issue would need to be addressed if the Community adopts a common arrest warrant. Considering the experiences of the EAW and the criticisms it attracted, such a common arrest warrant should be limited to serious offences and not to all offences. A common arrest warrant needs to be put into the context of a transnational criminal justice and be limited to serious

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<sup>986</sup> The offences include terrorism, trafficking in human beings, illicit trafficking in narcotic drugs and psychotropic substances, laundering of the proceeds of crime, environmental crime, corruption, fraud including that affecting the financial interests of the European Communities, computer related crime, sexual exploitation of children and child pornography, trafficking in stolen vehicles, illicit trafficking in weapons, munitions and explosives, participation in a criminal organisation, etc.

<sup>987</sup> Geyer, F. (2008). "European Arrest Warrant. Court of Justice of the European Communities. Judgment of 3 May 2007, Case C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*". *European Constitutional Law Review* 4, p.152 and 155,

<sup>988</sup> *Ibid.*

<sup>989</sup> *Ibid*

offences and those with a transnational dimension and which proceedings are transnational too. It is important to bear in mind that the aim of such a common arrest warrant should be to ensure the most serious criminals, and not ordinary criminals, are arrested and brought to justice. The idea of categorizing the most serious offences was put forward by a respondent to the interviews for this thesis too, though in a more general context of transnational criminal justice and not in relation to a common arrest warrant specifically.<sup>990</sup> Nevertheless, it is indicative of the need to avoid misuse of transnational criminal justice instruments, like an arrest warrant. The determination of the types of offences to which a common arrest warrant in the EAC would apply could be done by way of listing types of offences or identifying circumstances that attract extradition. Alternatively, a mixed method where a list of facts that fall under extradition and conditions for a minimum degree of criminal sanction would ensure a common standard is established throughout the EAC. Establishing a set of conducts coupled with the determination of minimum sentences for the conducts would prevent the inappropriate use of such a restrictive instrument with the negative consequences it entails for the individual.

The broad jurisdiction *ratione materiae* of the EAW lead to its excessive disproportionate use for minor offences such as thefts of 0,45 g of cannabis, 2 tyres, a piglet, a dessert from a restaurant, a chicken, bicycles, a bottle of beer, or detention of 3 ecstasy pills.<sup>991</sup> Fingers were pointed at Poland particularly, Czech Republic and Lithuania too, for issuing the EAW for trivial, ‘bagatelle’ offences.<sup>992</sup> It has been suggested that the disproportionate use of the EAW is intrinsically linked to East European countries’ civil law prosecution system typically based on legality, which does not allow the prosecution a margin of appreciation before prosecuting an offence, as opposed to common law opportunity system where the prosecution balances the severity of the offences with the interest to prosecute.<sup>993</sup> The reason of the misuse of the EAW is its notorious lack of a proportionality test. This strain in the EAW was remedied by the EU Commission after it

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<sup>990</sup> Interview with Respondent 7.

<sup>991</sup> Ostropolski, T. (2014). *Op.Cit.*, p.174. Also, Marin, L. (2014). *Op.Cit.*, p.335. And, Bonasera, J. (2017). *Op.Cit.*, p.651.

<sup>992</sup> Haggemüller, S., (2013). “The Principle of Proportionality and the European Arrest Warrant”. *Oñati Socio-legal Series* [online], 3 (1), p.99

<sup>993</sup> *Ibid.*, p.99, 101.

recognized the ‘systematic issue of the EAW’ as a problem of concern.<sup>994</sup> Unfortunately, the proportionality test inserted in the revised handbook on how to use the EAW is not binding. The EAW still lacks a mechanism to insulate it from a disproportionate use.<sup>995</sup>

In the EAC too, the differences in the national legal systems can undermine the appropriate use of common instruments for cooperation in criminal matters, such as warrants. In addition, the consequences for the inappropriate use of a common arrest warrant can be devastating for the individuals whose rights are affected. Therefore, it will be necessary to attach a proportionality test to a common arrest warrant to ensure it is used as an *ultima ratio* measure, especially in the context of MR and the obligation it imposes to execute courts’ judgments, decisions and orders including warrants. A normative basis for the proportionality principle will need to be established, to ensure fair issue of warrants by competent authorities.

The failure of the FD EAW to define the competent ‘judicial authorities’ for issuing the EAW caused divergent practices as a result of the differences in the legal systems of the EU Member States. This question was referred to the ECJ by the Amsterdam District Court in Poltorak, Kovalkovas and Özçelik, asking for legal clarification of the meaning of ‘judicial authorities’ and whether it was obliged to execute EAWs issued by the Swedish police, the Lithuanian Ministry of Justice and a Hungarian prosecution respectively.<sup>996</sup> The case shows how the differences in the legal systems can cause a challenge for the legality of mechanisms of cooperation in criminal matters and for the protection of the rights of individuals. The court based its interpretation on the theory of separation of power, emphasizing authorities involved in the administration of justice, namely judges and prosecutors, to the exclusion of the police which is essentially a branch of the executive.<sup>997</sup> The rights of individuals in the EAC would benefit a great protection if the issue of an East African arrest warrant was strictly limited to competent national authorities involved in the administration of justice.

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<sup>994</sup> Bonasera, J. (2017). *Op.Cit.*, p.656.

<sup>995</sup> Hagenmüller, S., (2013). *Op.Cit.*, p.102.

<sup>996</sup> Van der Mei, A.P. (2017). “The European Arrest Warrant system: Recent developments in the case law of the Court of Justice”. *Maastricht Journal of European and Comparative Law* 2017. 24(6), p. 886.

<sup>997</sup> *Ibid.*

An arrest warrant affects fundamental rights such as the right to liberty and *habeas corpus*, the right to private life but also the prohibition of torture, inhumane and degrading treatment guaranteed under international instruments.<sup>998</sup> The interference is even greater in the context of cooperation given the individual is confronted to unfamiliar legal systems, let alone difficulties in communicating in foreign languages. In view of the multiplicity and divergences of procedural laws and the risk of infringement for the persons affected, a common arrest warrant must guarantee sufficient protection of procedural rights as well as the integrity and dignity of individuals against outrageous detention conditions and atrocious sentences such as death penalty which is still applicable in in the EAC, in Kenya, Uganda and South Sudan.

The main provision on rights protection in the FD EAW, Article 1(3), provides that the FD shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU. Further reference to individual rights is made in the preamble, particularly recitals 10, 12 and 13. Although the FD EAW's aim is to replace conventional extradition with a surrender system based on MR between Member States, it has been plagued by tensions between the application of MR to extradition procedures and the protection of individual rights ever since its inception.<sup>999</sup> In Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, the ECJ attempted to reconcile the need to uphold the integrity of the EAW system with the protection of the fundamental rights of the requested person.<sup>1000</sup> It ruled that the execution of an EAW must be postponed if and for so long as there is a real risk of inhuman or degrading treatment arising from detention conditions in the issuing Member State.<sup>1001</sup> With this ruling, the ECJ did not introduce a new ground of refusal; it opted instead for a ground of mandatory postponing of the execution of an EAW, which is not provided for

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<sup>998</sup> See Blackstock, J. (2010). "The European Arrest Warrant Briefing and Suggested Amendments". *New Journal of European Criminal Law* 1(1), p.21.

<sup>999</sup> Van Ballegooij, W., & Bard, P. (2016). "Mutual recognition and individual rights: Did the court get it right?". *New Journal of European Criminal Law* 7(4), p.442.

<sup>1000</sup> Gaspar-Szilogyi, S. (2016). "Joined Cases Aranyosi and Căldăraru: Converging human rights standards, mutual trust and a new ground for postponing a European Arrest Warrant". *European Journal of Crime, Criminal Law and Criminal Justice* 24(2-3), p.218.

<sup>1001</sup> Caeiro, P, Fidalgo, S. and J. Prata Rodrigues (2018). "The evolving notion of mutual recognition in the CJEU's case law on detention". *Maastricht Journal of European and Comparative Law* 25(6), p.699.



expressly in the EAW.<sup>1002</sup> While the ruling did not detail whether it covered also other fundamental rights, it is argued that, in the interest of protecting fundamental rights of the requested person, national courts should be able to postpone the execution of an EAW if a 'real risk' exists that other fundamental rights of the requested person, such as the right to effective judicial remedies, would be breached in the Member State.<sup>1003</sup> In a recent decision (Case C-216/18 PPU LM, EU:C:2018:586), the ECJ extended the *Aranyosi and Căldăraru* ruling to cover the real risk of a breach of the fundamental right of a fair trial as per Article 47(2) CFREU.<sup>1004</sup>

In view of the differences in the procedural laws of the EU Member States and their unequal protection of rights, the mere reference to national legal systems for the enforcement of rights protection is inadequate as is the reference to human rights in the preamble of the FD EAW insufficient. It could be argued that the risks for infringements of individual rights, particularly the abolition of dual criminality and the political offence and nationality exceptions traditionally considered as the expression of the protection states owe to their citizens notwithstanding the distrust in foreign legal systems,<sup>1005</sup> requires a more explicit protection of rights in an instrument such as the EAW. The respondents to the interviews for this thesis were slightly divided on the question whether an EAC instrument on mutual assistance in criminal matters should provide an explicit ground for refusal to cooperate in case a request violates human rights. Most of them opposed the idea on the ground that it creates a certain contradiction and a practical enforcement problem.<sup>1006</sup> The respondent in favour of the idea expressed concerns about death penalty in extradition and argued that it is standard practice to put exceptions in international instruments, making a direct reference to the security and public health exceptions to the freedom of movement principle under the EAC Common Market Protocol.<sup>1007</sup> The EAW has been praised overall, despite the challenges to its legality and constitutionality in a few States. It was acclaimed for being a more efficient instrument than the traditional extradition.<sup>1008</sup> Statistical

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<sup>1002</sup> Gaspar-Szilogyi, S. (2016). *Op.Cit.*, p.211.

<sup>1003</sup> *Ibid.*, p.213.

<sup>1004</sup> Caeiro, P, Fidalgo, S. and J. Prata Rodrigues (2018). *Op.Cit.*, p.700.

<sup>1005</sup> Pirlac, A. (2011). "General Framework for the Implementation Decision no.2002/584/JAI on the European Arrest Warrant". *The Annals of The "Stefan cel Mare" University of Suceava* 1(13), p.350.

<sup>1006</sup> Interviews with Respondents 1, 2, 3, 4, and 5.

<sup>1007</sup> Interview with Respondent 6.

<sup>1008</sup> Bonasera, J. (2017). *Op.Cit.*, p..650-651.

data for the decade after the adoption of the EAW suggest that it expedited the extradition process and increased the average time for extraditing a person from 9-12 months to 45-48 days, and to 15-17 days where the person consents to surrender.<sup>1009</sup>

#### *5.2.2.2. Mutual recognition and assistance in evidence*

Assistance in evidence is perhaps the most valuable form of cooperation in criminal matters, given the importance of evidence in the determination of criminal liability. While obtaining some types of evidence in an ordinary case can be fairly difficult, the process becomes even harder where the authorities of a state need to access evidence that is lying in another state. Also, the field of evidence has been affected by technological advances, just as crime has become more digital, changing face and increasingly affecting more states at once and faster.

Member States of the EU sought to device a mechanism that expedites and simplifies the procurement and transmission of evidence among them. Attempts at creating a mechanism for assistance in evidence resulted in two different instruments in the MR model. At first, the Council of Ministers adopted the FD 2008/978/JHA on the EEW for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters. The EEW was modelled on the EAW and shared many of its characteristics, such as the restriction of grounds for refusal, the obligation imposed on the executing State to grant the assistance sought, the establishment of strict time-limits for executing the warrant, the judicialization of the process and the establishment of a standard form in replacement of the letter rogatory. It replicated the same list of 32 offences for which verification of dual criminality is not allowed unless a search or seizure is requested (Article 14(2) FD EEW). The EEW was meant to be issued for obtaining evidence that is already in possession of the executing authority prior to the issuing of the warrant (Article 4(4) FD EEW). The evidence could include objects, documents or data from the search of the suspect's premises, historical data from witnesses, or records resulting from special investigative techniques. The EEW excluded the taking of evidence from interviews, statements or hearings, the taking of evidence from a person's body including DNA and fingerprints, real-time evidence such as interceptions of communications or the monitoring of bank accounts,

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<sup>1009</sup> *Ibid.*

evidence requiring analysis of existing objects, documents or data, and evidence related to electronic communication data retained by service or network providers (Article 4(2) FD EEW). These and all other evidences falling outside the ambit of the EEW had to be obtained by using the MLA instruments. In practice, the EEW existed in tandem with the MLA model (Recital 18(a) FD EEW). It was implemented only in a dozen of Member States. Hence, it has never had any measurable impact.<sup>1010</sup> The coexistence of the two models in evidentiary matters rendered assistance very complex and fragmented.<sup>1011</sup> Paradoxically, the fragmentation constituted a counter-effect to the very objective of the MR model to simplify and expedite cooperation in criminal matters. Consequently, the search for a more comprehensive system applicable to all types of evidence, to replace all existing instruments for assistance in evidence, resulted in the adoption by the European Parliament and the Council, on 3<sup>rd</sup> April 2014, of Directive 2014/41/EU on the EIO in criminal matters.

The EIO is defined as a judicial decision issued and validated by a judicial authority of a Member State, to carry out investigation to obtain evidence in another Member State or to request the transmission of evidence already in the possession of the executing State (Article 1). As the name suggests, the EIO is an order; it is an obligation to the authority in the executing State to provide the authority in the issuing State with the assistance sought, save where conditions for non-execution apply.

The Directive establishes a procedure for the issue, recognition and execution of the EIO. The EIO can be issued in respect of existing or prospective criminal proceedings under the law of the issuing State, as well as administrative proceedings that may give rise to criminal proceedings (Article 4). Such extension of the EIO to administrative proceedings extends its ambit to cases

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<sup>1010</sup> Mangiaracina, L. (2013). "A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order". *Utrecht Law Review* 10 (1), p.115.

<sup>1011</sup> Belfiore, R. (2014). "Critical Remarks on the Proposal for a European Investigation Order and Some Considerations on the Issue of Mutual admissibility of Evidence". In: Ruggeri, S. (Ed.). *Transnational Evidence and Multicultural Inquiries in Europe*. Springer. London, p.93.

where criminal proceedings may never take place.<sup>1012</sup> The EIO should have been limited to criminal proceedings, strictly speaking.

The scope of application of the EIO is deliberately wide to take into account the differing roles of the police and prosecutors in the Member States.<sup>1013</sup> *Ratione materiae*, it applies to any type of evidence, with the exception of the JITs and the gathering of evidence by such teams, and to any criminal proceedings with no limit to specific offences (Article 3). Unlike the EEW, the EIO allows to request evidence that does not yet exist. It makes possible to request to interview suspects or witnesses, or to obtain real-time information by intercepting and monitoring telephones or email communications or bank and financial accounts and systems.<sup>1014</sup> It also makes possible to obtain DNA samples or fingerprints and to send the information to the issuing State.<sup>1015</sup> The Directive makes provisions for specific measures such as the transfer of persons held in custody for the purpose of carrying out an investigative measure, the hearing by videoconference and teleconference, covert investigations, and controlled deliveries. *Ratione personae*, it can be issued by various authorities, including judges and prosecutors and other authorities as determined by the issuing State (Article 2). This raises concern for legality and proportionality, especially for invasive measures.<sup>1016</sup>

Unlike the EAW, the EIO establishes a proportionality safeguard for the measures sought. It requires the issuing authority to assess and ensure the measures requested are necessary and proportionate to the rights of the suspects or accused (Article 6). The imposition of this duty on the issuing State rather than the executing State reflects the very nature of MR. An assessment of the necessity and proportionality of an EIO by the executing State would create an unintended ground for refusal. Nevertheless, the EIO indirectly gives the possibility to the executing State to weigh the proportionality of the requested measure. It allows the executing State to have

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<sup>1012</sup> See Rafaraci, T. (2014). "General Considerations on the European Investigation Order". In: Ruggeri, S. (Ed.). *Transnational Evidence and Multicultural Inquiries in Europe*. Springer. London, p.39

<sup>1013</sup> The European Investigation Order, at [www.app.college.police.uk/app-content/investigations/european-investigations/european-investigation-order/](http://www.app.college.police.uk/app-content/investigations/european-investigations/european-investigation-order/), accessed on 25 May 2018.

<sup>1014</sup> Mangiaracina, L. (2013). *Op.Cit.*, p.120.

<sup>1015</sup> Ibid

<sup>1016</sup> Schünemann, B. (2014). "The European Investigation Order. A Rush into the Wrong Direction". In: Ruggeri, S. (Ed.). *Transnational Evidence and Multicultural Inquiries in Europe*. Springer. London, p.32.

recourse to an investigative measure other than that indicated in the EIO, if the same result would be achieved by less intrusive means (Article 10(3)).

The EIO lays down the grounds for non-recognition or non-execution. These include where immunity or privilege apply under the law of the executing State; where the execution of the EIO would harm essential national interests or jeopardize the source of information or involve the use of classified intelligence; where the investigative measure would not be authorized in a similar domestic case in the executing State; *ne bis in idem*; where execution of the investigative measure indicated in the EIO would be incompatible with the executing state's obligation under Article 6 TEU and the CFREU (Article 11). Three more grounds for refusal take the form of a territorial clause<sup>1017</sup>: where the EIO relates to a criminal offence alleged to have been committed outside the territory of the issuing State and wholly or partly on the territory of the executing State, and the conduct for which the EIO is issued is not an offence in the executing State; where the conduct for which the EIO has been issued does not constitute an offence under the law of the executing State, unless it concerns an offence listed within the 32 categories of offences that correspond to the same categories listed in the EAW; and where the executing State restricts the use of the investigative measure indicated in the EIO to offences punishable by a certain threshold that excludes the offence concerned by the EIO..

The Directive allows the executing State to postpone the recognition or execution of the EIO until such time as necessary, where execution might prejudice an on-going investigation or prosecution or where the evidence concerned is already being used in other criminal proceedings (Article 15). It applies strict time-limits for the execution of the EIO and sets as principle that recognition or execution of the EIO must be carried out with the same celerity and priority as in a similar domestic case. A decision to recognize or execute the EIO must be taken within 30 days. The investigative measure must be carried out within 90 days extendable to 30 more days (Article 12). Surprisingly, the directive does not set any time-limit for the transfer of evidence, except the duty imposed on the executing State to transfer, without undue delay, the evidence obtained or

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<sup>1017</sup> See, Bachmaier Winter, L. (2014). "The Proposal for a Directive on the European Investigation Order and Grounds for Refusal: A Critical Assessment". In: Ruggeri, S. (Ed.). *Transnational Evidence and Multicultural Inquiries in Europe*. Springer. London, p.84.

already in its possession (Article 13). The transfer of the evidence may be suspended pending the determination of a legal remedy.

The Directive empowers the issuing State to request the executing State to observe the formalities and procedures expressly indicated by the issuing State, unless they are contrary to its fundamental principles of law (Article 9(2)). This provision reflects Article 4(1) EU 2000 MLA Convention; it combines the application of the *lex loci* (typical of the MLA model) and the *lex fori* (typical of the MR model). Considering the differences in the evidence rules of the Member States, the provision indirectly addresses the difficult issue of the admissibility of evidence in the issuing State.<sup>1018</sup> Furthermore, the Directive imposes a duty on the executing authority to consult and inform the issuing authority, for example, before deciding not to recognize or to execute the EIO, before substituting the requested measure (Article 10(4)), when it cannot meet the time-limits for recognizing or executing the EIO (Article 12(5-6)), etc. Perhaps the most innovative method in the Directive is the possibility given to the issuing authority to request that one or more of its authorities assist in the execution of the EIO<sup>1019</sup> to the extent that they would be able to do so in a similar domestic case (Article 9(4)), although such participation does not imply law enforcement (Article 9(5)). The provision potentially facilitates the admissibility of evidence in the issuing State. It adds an extra-territorial function to the power of the issuing State who is able to choose the measure to be executed, for example, oral evidence and the examination of witnesses.<sup>1020</sup>

The directive raises major concerns for human rights implications and fair trial, of the way evidence is gathered and shared across borders. Although it provides for the possibility for the suspect or accused too, or their lawyer, to request an EIO (Article 1(2)), it is flawed by the absence of the defence in the execution of the EIO in many ways.<sup>1021</sup> For example, it does not require the presence of the defence at the hearing by videoconference or teleconference. Considering

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<sup>1018</sup> Ruggeri, S. (2014). "Introduction to the Proposal of a European Investigation Order: Due Process Concerns and Open issues". In: Ruggeri, S. (Ed.). *Transnational Evidence and Multicultural Inquiries in Europe*. Springer. London, p.10.

<sup>1019</sup> Ruggeri, S. (2014). *Op.Cit.*, p.10.

<sup>1020</sup> *Ibid.*, p.17.

<sup>1021</sup> Belfiore, R. (2014). *Op.Cit.*, p.102.

evidence is the outcome of specific rules in every country, which strict compliance determines its genuineness, the EIO poses the risk of admitting evidence that was gathered inappropriately and thus violating the right to fair trial. A classic example is admitting as evidence the written declaration of a witness that was not obtained under cross-examination, or the statement of a suspect questioned by the police in the absence of a lawyer. While presumably the issuing authority may request the participation of the defence under the 'formalities and procedures' in the execution of the EIO, this makes the participation of the defence entirely dependent on the issuing State.<sup>1022</sup> Given the differences in the rules of evidence, the failure to require the participation of the defence in the execution of the EIO puts individuals at risk of unfairness and inequality. Further unfairness concerns the provisions on legal remedies which limit the power to challenge the substantive reasons for issuing the EIO only in an action brought before a court of the issuing State. (Article 14(2)) Consequently, this 'distribution of competence typical of the MR model'<sup>1023</sup> is unfair to the defence whose ability is already limited by geographical distance, language challenges and the ignorance of the legal system, laws and procedures of the issuing State.

The EIO endangers the right to privacy too. The possibility for real-time evidence gathering, such as interception of telecommunications and obtaining information on bank accounts interferes with individuals' rights to private life and correspondence, both protected by Article 8 ECHR and Articles 7 and 8 CFREU. The Directive does not explicitly provide minimum guarantee, such as those provided in the FD 2008/977/JHA (on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters), for the protection of individuals who are subject of the measures. This is a matter of concern considering the differences in the national laws regulating intercepts, the crimes for which they may be used, who may authorize them, and specific obligations such as the disclosure of certain materials to the defendant.<sup>1024</sup> The respondents to the interviews for this thesis too expressed concerns about possible violations of the right to privacy in transnational enquiries.<sup>1025</sup> They

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<sup>1022</sup> *Ibid.*

<sup>1023</sup> Ruggeri, S. (2014). *Op.Cit.*, p.21.

<sup>1024</sup> Mangiaracina, L. (2013). *Op.Cit.*, p.118.

<sup>1025</sup> Interviews with Respondents 7 and 8.

recommended putting in place safeguards and limitations to protect individuals' rights and suggested the involvement of courts, specifically, when rights are at risk.<sup>1026</sup> While they recognized that it is difficult to foresee how the safeguards and limitations would operate, they recommended that the safeguards and limitations operate prior to the execution of a request for assistance.<sup>1027</sup> A respondent wished the safeguards and limitations are undertaken by the court in the issuing State, to ensure the evidence is admissible.<sup>1028</sup> Further risks for infringements of the right to private life by the EIO concern the taking of evidence from the body of a person such as DNA samples and fingerprints. The Directive allows the executing State to indicate whether the evidence must be returned to it once no longer required in the issuing State. (Article 13(3)). However, it does not mention whether the issuing State is entitled to make copies of the evidence.<sup>1029</sup> The situation raises concern in respect of data protection, storage and retention. Due regard must be given to the context in which private data are recorded, retained and used.

The insufficiency in human rights protection in the EIO overall stems from the lack of explicit proclamation of the rights of the defence. The mere reference to compliance with the ECHR and the CFREU in its preamble has attracted strong criticisms for being inadequate for the protection of human rights.<sup>1030</sup> The insufficient protection of rights in the EIO reflects the tension between MR and human rights, in particular the extension of MR, a principle initially conceived for trade and goods, to evidence has been found problematic, especially in view of the variances in the national evidence rules.<sup>1031</sup> The lack of common rules in evidence, data protection and criminal procedure has prompted questions on the suitability of a 'one size fits all' approach to transnational investigations and evidence gathering,<sup>1032</sup> or at least the need for a mechanism such as the EIO which proposal was viewed by some Member States, such as the United Kingdom and Germany, as premature.<sup>1033</sup> The same concerns are applicable to the EAC. However, this

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<sup>1026</sup> Interviews with Respondents 6, 7, and 8.

<sup>1027</sup> *Ibid.*

<sup>1028</sup> Interview with Respondent 7.

<sup>1029</sup> Blackstock, J. (2010). "The European Investigation Order". *New Journal of European Criminal Law* 1(4), p.492.

<sup>1030</sup> Vogler, R. (2014). "The European Investigation Order: Fundamental Rights at Risks?". In: Ruggeri, S. (Ed.). *Transnational Evidence and Multicultural Inquiries in Europe*. Springer. London, p.46.

<sup>1031</sup> Schünemann, B. (2014). *Op.Cit.*, p.31.

<sup>1032</sup> Allegrezze, S. (2014). *Op.Cit.*, p.54.

<sup>1033</sup> Bachmaier Winter, L. (2014). *Op.Cit.*, p.87-88.



research conceives the establishment of an instrument for gathering and sharing evidence in the EAC as a ‘work in progress’ which will be achieved gradually. The research also considers that the choice of the appropriate term for an instrument for assistance in evidence in the EAC is not so much relevant. What matters is the scope of such instrument. It should be broad enough to cover the collection and transfer of all types of evidence. This research recommends the use of the term “evidence warrant”, for uniformity with ‘arrest warrant’. Efforts should be directed towards ensuring the instrument enables the national competent authorities to communicate with one another to solve potential hindrances in the execution of requests for assistance. When asked how could the EAC address issues of legality and admissibility of evidence in transnational proceedings, considering the differences in the national rules of evidence, a respondent to the interviews for this thesis expressed the same idea, in the following terms:” I think the only way it can remotely be addressed is that you send the information to the relevant agencies, the prosecution departments and then they look at the procedures that they have in their country to see whether this particular kind of evidence at hand is helpful to them or is even admissible in the court ...”.<sup>1034</sup> Such communication between national authorities will necessitate institutional mechanisms.

### 5.3. Institutional means

The complexity of transnational crime as criminal actions committed in the territories of several countries by several accomplices often with different citizenships or residing in different countries<sup>1035</sup> requires the coordination of cooperation efforts at the regional level. This has been acknowledged, in the EU, through the establishment of various institutions aimed at facilitating cooperation between the competent authorities of the Member States. The institutions were developed at different periods of the integration process of the EU. Their nature was directly influenced by the overall institutional arrangement of the EU. This section discusses the institutions that were designed to create general networks between law enforcement and judicial authorities as most important, specifically liaison magistrates, EJM, EUROPOL and EUROJUST. It does not examine additional institutional mechanisms or operational networks for

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<sup>1034</sup> Interview with Respondent 7.

<sup>1035</sup> Ruggeri, S. (2014). “Transnational Investigations and Prosecution of cross-Border Cases in Europe: Guidelines for a Model of Fair Multicultural Criminal Justice”. *Op.Cit.*, p.219.

the facilitation of the joint policing or prosecution of serious crimes in the EU, such as JITs, PCTF, CEPOL, the Prüm decisions and ECRIS.

### 5.3.1. Types of institutions

The development of institutions in the cooperation system of the EU shows two opposed trends. The MLA model was predominantly marked by the establishment of institutions that operated horizontally. The reason of this trend is to be found in the institutional framework of the EU as established by the TEU signed in Maastricht in 1992 and entered into force in 1993. The treaty created the third pillar JHA, the former framework for cooperation in justice, under Title VI, with its own intergovernmental method in contrast to the supranational character of the first pillar, the European Community.<sup>1036</sup> Consequently, the institutions created to facilitate cooperation in criminal matters, in the third pillar JHA, bore an intergovernmental character.<sup>1037</sup> First among them was the liaison magistrate, a concept promoted by the EU and borrowed from the French law<sup>1038</sup> and which has become a common occurrence in international cooperation.<sup>1039</sup> On 22 April 1996, the Council of Ministers adopted Joint Action 96/277/JHA on a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the EU. Furthermore, the post-Amsterdam TEU (Article 30(2)(c)) called on the Council to ‘promote liaison arrangements between prosecuting /investigating officials specializing in the fight against organized crime...’. The liaison magistrate is an official with special expertise in cooperation, posted in another state on the basis of bilateral or multilateral agreements, to expedite and ensure effectiveness of cooperation as well as facilitate mutual understanding between the national legal systems concerned.<sup>1040</sup> Liaison magistrates are sent to countries where differences in legal systems have caused delays.<sup>1041</sup> They do not have extraterritorial power.<sup>1042</sup> The

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<sup>1036</sup> Peers, S. (2002). “The European Union and substantive criminal law: Reinventing the wheel?”. *Netherlands Yearbook of International Law* XXXIII, p.49.

<sup>1037</sup> Markert, M. (2014). “Tacit procedural politics: institutional change and member states’ strategies in police and judicial cooperation in criminal matters”. *Cambridge Review of International Affairs* 27(1), .107.

<sup>1038</sup> Rabatel, B. (2015). “‘Liaison magistrates’: Their Role in International Judicial Cooperation and Comparative Law”. *Oxford Scholarship online*, p.3.

<sup>1039</sup> Campos-Pardillos, M- Á. (2017). ““Liaison magistrates” and “contact points” as a “remedy” against “high levels of mistrust”: Metaphorical imagery in scholarly papers on EU judicial cooperation””. *Ibérica* 34, p.248.

<sup>1040</sup> Joutsen, M. (2006). *The European Union and Cooperation in criminal Matters: the search for Balance*. HEUNI Paper 25, p.17.

<sup>1041</sup> *Ibid.*

<sup>1042</sup> *Ibid.*

advantages of liaison magistrates include overcoming language problems, discussing requests for cooperation to identify and avert possible issues, and promoting mutual trust in the legal systems.<sup>1043</sup>

The second mechanism with an intergovernmental character, the EJM, was set up on the basis of Joint Action 98/428 JHA of 29th of June 1998, to promote direct contacts between prosecutors and judges, linking up the central authorities for international cooperation in criminal matters and other authorities with specific responsibilities within the context of international cooperation.<sup>1044</sup> It focuses on promoting effective cooperation in respect of serious crime such as organized crime, corruption, drug trafficking and terrorism, by providing legal and practical information to competent local authorities, providing support with request for cooperation, creating a EU judicial culture, and cooperation with other judicial networks and partners including third countries.<sup>1045</sup> The network is composed of national contact points, designated by each Member State, who are judges, prosecutors and representatives of the Ministries of Justice.<sup>1046</sup> The EJM does not have legal personality.<sup>1047</sup>

The third mechanism in the series is the European Police Office, the establishment of which was agreed in the TEU. Article K.1 provided that Member States would consider as a matter of common interest “police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office”. Subsequently, Europol was created as an intergovernmental body, outside the Community legal framework and with its own Convention signed on 26 July 1995 and entered into force on 1 July 1999.<sup>1048</sup> Europol works through a network of Europol Liaison Officers seconded by the Europol National Units created

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<sup>1043</sup> *Ibid*, p.17-18.

<sup>1044</sup> Petrescu, O.M. (2013). “The European judicial cooperation in criminal matters in the light of the Lisbon treaty”. *Challenges of the Knowledge Society*, p.1218.

<sup>1045</sup> *Ibid*.

<sup>1046</sup> *Ibid*.

<sup>1047</sup> Serzysko, A. (2011). “Eurojust and the European Judicial Network on a new legal basis”. *ERA Forum* 11, p.598

<sup>1048</sup> Busuioc, M., Curtin, D. and M. Groenleer (2011). Agency growth between autonomy and accountability: the European Police Office as a ‘living institution’. *Journal of European Public Policy* 18(6), p.854.

and located in each Member State.<sup>1049</sup> The Europol National Units provide a link between Europol and national police authorities. Europol is conceived as an executive police force without autonomous investigative powers.<sup>1050</sup> Europol officers cannot carry guns, conduct home searches or tap wires, nor can they question, arrest or detain suspects.<sup>1051</sup>

The creation of the Area of Freedom, Security and Justice by the Treaty of Amsterdam (Article 3 TEU), -to ensure the free movement of persons and to offer a high level of protection to European citizens, and which covers, amongst other policy areas, cooperation in criminal matters (Articles 67-89 TFEU)- , coupled with the move towards the MR model of cooperation in criminal matters exceeded the scope of the intergovernmental structure of the JHA and prompted the search for more supranational institutions. Existing institutions were reformed, particularly Europol. The Europol Convention was amended with three protocols<sup>1052</sup> before it was replaced by the Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office, which entered into effect on 1<sup>st</sup> January 2010. The Council Decision transformed Europol from an intergovernmental organization into an agency of the EU.<sup>1053</sup> Consequently, Europol lost its own legal status as an international organization established by international law; its legal personality is now derived from the EU.<sup>1054</sup>

Amid the institutional reforms of the former JHA, a new institution, Eurojust, was created by Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime. Eurojust was established as a permanent body with legal personality and entitled to negotiate cooperation agreements with third states.<sup>1055</sup> It was built on an integrated approach between the police, the prosecution and the judiciary, with a purely supportive role in cooperation in criminal matters including facilitating direct contacts between national authorities

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<sup>1049</sup> *Ibid.*

<sup>1050</sup> Kaunert, C. (2010). "Europol and EU Counterterrorism: International Security Actorness in the External Dimension. *Studies in Conflict & Terrorism* 33(7), p.655.

<sup>1051</sup> Busuioc, M., Curtin, D. and M. Groenleer (2011). *Op.Cit.*, p.854.

<sup>1052</sup> Birzu, B. (2016). "Cooperation Agreement between the European Central bank and Europol for Combating Euro Counterfeiting. Some Critical Opinions". *Acta Universitatis Danubius (AUDJ)* 12(2), p.85.

<sup>1053</sup> Kaunert, C. (2010). *Op.Cit.*, p.666.

<sup>1054</sup> *Ibid.*, p.667.

<sup>1055</sup> Coninx, M. and L.L. Da Mota (2009). "The International Role of Eurojust in Fighting Organised Crime and terrorism". *European Foreign Affairs Review* 14, p.167.

and a better use of existing measures of cooperation.<sup>1056</sup> Eurojust has no binding power. It is a mediator, a facilitator without any decision-making power vis-à-vis national authorities.<sup>1057</sup> It has no investigative powers, having been configured as an intergovernmental body in the perspective of the former JHA third pillar of the EU.<sup>1058</sup> Eurojust is tasked with facilitating the execution of MLA and the implementation of extradition requests (Article 3(1)(b)) and advising in case two or more Member States have issued an EAW for the same person (Article 16 (2) FD EAW). It is entrusted with the power to monitor breaches of time-limits regarding the execution of EAWs which, according to Article 17(7) of the 2002 FD EAW, Member States have to report to Eurojust with giving reasons for the delay. The monitoring power of Eurojust has been reinforced by the Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Council Decision 2002/187/JHA, which requires Member States to inform their national member of the setting-up of any JIT and the results of its work (Article 13(5) and of any request or decision on judicial cooperation transmitted to at least two Member States and involving specific serious crimes, cases involving criminal organisations, or those with a serious cross-border dimension (Article 13(6)). The agency has clearly a number of supranational features.<sup>1059</sup> Its most active function is the potential to trigger prosecutions in national level.<sup>1060</sup> While member states are given the possibility of not complying with a request by Eurojust, they are obliged to justify their non-compliance (Article 8). Article 85(1)(a) TFEU opens new prospects in terms of initiation of criminal investigations, which is entirely up to national authorities so far. It provides for the possibility of a direct initiation of criminal investigations by Eurojust.

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<sup>1056</sup> Patrone, I. (2013). "Conflicts of jurisdiction and judicial cooperation instruments: Eurojust's role". *ERA Forum* 14, p.223.

<sup>1057</sup> Weyembergh, A. (2013). "Coordination and initiation of investigations and prosecutions through Eurojust". *ERA Forum*, p.178.

<sup>1058</sup> Hamran, L and E. Szabova (2013). "European Public Prosecutor's Office – Cui Bono? *New Journal of European Criminal law* 4(1-2), p.47.

<sup>1059</sup> By virtue of article 6(1) and 7(1) Council Decision establishing Eurojust, Eurojust can ask the competent authorities of the member states concerned, giving its reasons, (i) to undertake an investigation or prosecution of specific acts, (ii) accept that one of them may be in a better position to undertake an investigation or to prosecute specific acts, (iii) coordinate between the competent authorities of the member states concerned, (iv) set up a joint investigation team in keeping with the relevant cooperation instruments, (v) provide it with any information that is necessary for it to carry out its tasks, (vi) take special investigative measures, and (vii) take any other measure justified for the investigation or prosecution.

<sup>1060</sup> Monar, J. (2013). "Eurojust's present and future role at the frontline of European Union criminal justice cooperation". *ERA Forum* 14, p.190.

Nevertheless, Eurojust cannot carry out formal procedural acts. Formal judicial procedural acts are carried out by the competent national officials (Article 85 (2)). This last provision strengthens the power of Eurojust. It is argued that despite the omission of the word ‘investigations’ unlike in Article 85(1), the express reference to ‘prosecutions’ in Article 85(2)<sup>1061</sup> includes both investigations and prosecutions by competent national officials, including any members of Eurojust who would be expressly recognized as having such powers.

Eurojust fulfills its tasks through national members seconded by each Member State in accordance with its legal system.<sup>1062</sup> The national member must be a prosecutor, judge or police officer with equivalent competences.<sup>1063</sup> They handle individual cases and all information exchanged between Eurojust and a member state is directed through them.<sup>1064</sup> They have access to their national criminal records and are empowered to exchange information with other national members.<sup>1065</sup> While they remain part of their national jurisdictions, they work at Eurojust’s premises.<sup>1066</sup>

There have been arguments in Europe in favour of moving towards a more supranational approach to prosecution in cooperation, instead of mere ‘coordination’ and ‘strengthening’ role conferred to Eurojust. First ideas for supranational prosecution in Europe date way back before the establishment of Eurojust.<sup>1067</sup> They were brought about by concerns over offences against the budget of the EU. The concerns have led to the establishment of the EPPO, for the protection of the financial interests of the EU.<sup>1068</sup> Article 86 TFEU is the basis for founding an EPPO as a supranational body. This research will not discuss the latter institution for two reasons. Firstly,

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<sup>1061</sup> Article 85(2) TFEU: “In the prosecutions referred to in paragraph 1, and without prejudice to Article 86, formal acts of judicial procedure shall be carried out by the competent national officials”.

<sup>1062</sup> Busuioc, M. (2013). “Beyond Design: The Evolution of Europol and Eurojust”. *Perspectives on European Politics and Society* 14(3), p.290-291.

<sup>1063</sup> Serzysko, A. (2011). *Op.Cit.*, p.589.

<sup>1064</sup> Busuioc, M. (2013). *Op.Cit.*, p.291.

<sup>1065</sup> Bures, O. (2010). “Eurojust’s Fledgling Counterterrorism Role”. *Journal of Contemporary European Research* 6(2), p.238.

<sup>1066</sup> Busuioc, M. (2013). *Op.Cit.*, p.291.

<sup>1067</sup> Gomez-Jara Diez, C. and E. Herlin-Karnell (2018). “Prosecuting EU financial crimes: The European Public Prosecutor’s Office in comparison to the US federal regime. *German Law Journal* 19(5), p.1200.

<sup>1068</sup> Commission Regulation 2017/1939 of Oct. 12, 2017, Implementing Enhanced Cooperation on the Establishment of the European Public Prosecutor's Office, 2017 O.J. (L 106) 1, 1-71

the aim of the EPPO contrasts with cooperation as investigated here. Secondly, it has not been operational yet, hence it cannot be assessed.

### 5.3.2. The relevance of the institutions for the EAC

The evaluation, in this research, of the relevance for the EAC of the institutions developed for cooperation in criminal matters in the EU is guided by two assumptions. Firstly, tackling transnational crime at the regional level needs a comprehensive approach. Accordingly, not only responses to transnational crime must cover all the stages of the criminal process<sup>1069</sup> but also address the root causes of the crimes. Secondly, transnational crime poses a challenge from its extension across multiple jurisdictions and so requires well-coordinated criminal justice responses amongst the countries in the region. Therefore, an integrated approach to a regional response to transnational crime is important for efficiency but also for promoting the spirit of cooperation among the key actors of the criminal justice systems. In accordance with the criteria above, this research considers necessary the establishment of a regional police and an agency for criminal justice in the EAC, similar to Europol and Eurojust.

#### 5.3.2.1. An East African Police

The idea of creating a regional police is based on the assumption that the traditional state-embedded policing model and authority is inappropriate for curbing transnational crime in the EAC in view of the expansion of criminal networks across borders by communication technology, banking, shipping and transportation systems that facilitate their operations.<sup>1070</sup> The view corresponds with the academic criminologist discourse as well as a certain popular language that associate the expansion of transnational crime with globalization and argue that there is an established need to develop transnational policing.<sup>1071</sup>

A claim advances that the policing field has been a fragmented terrain since the end of the Cold War and the rise to prominence of neoliberalism.<sup>1072</sup> It also argues that policing has become

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<sup>1069</sup> Coffey, G. (2013). *Op.Cit.* p.61

<sup>1070</sup> Mcgarrell, E. F. (2014). "Global and Local policing: Common Principles for the Future of Policing". *International Journal of Comparative and Applied criminal justice* 28(1), p.5.

<sup>1071</sup> William, J. and E. Sheptycki (2007). "Transnational crime and transnational Policing". *Sociology Compass* 1(2), p.485.

<sup>1072</sup> *Ibid.*, p.490.

transnational and is no longer embedded in the sovereign nation state.<sup>1073</sup> This transformation of policing is described as symptomatic of the postmodern and the shift in contemporary society towards transnational practices.<sup>1074</sup> A more pessimistic account advances that the fragmentation of the policing machine has given way to a chaotic policing system in postmodern institutions.<sup>1075</sup> The assumption that the state holds a monopoly on the legitimate use of coercive force in the maintenance of social order on its own territory does no longer hold true.<sup>1076</sup> A host of other actors, transnational corporations, private interests, the media and the civil society compete to influence the social order by using the means at their hands.<sup>1077</sup>

The necessity of establishing a transnational policing system in the EAC would quite legitimately be questionable in view of the existence of Interpol, probably because it is the oldest framework for police cooperation and the best-known global policing institution. However, Interpol was designed to be a global framework. Its primary purpose is to promote mutual assistance between police organisations in separate countries.<sup>1078</sup> Its global focus does not make it the perfect mechanism for cooperation in a transnational setting.<sup>1079</sup> Furthermore, Interpol was not constituted through a treaty, convention or any similar instrument. It was founded upon a constitution drafted by a random group of police officers without the involvement of their respective governments.<sup>1080</sup> Thus this research recommends the establishment of a transnational policing mechanism in the EAC, on the basis of cooperation.

Critics rightly point out that transnational policing is invariably presented in terms of liberal values.<sup>1081</sup> While this holds true, this research would fall short if it ignored the governance

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<sup>1073</sup> Sheptycki, J. (2002). "Accountability Across the policing Field: Towards a General Cartography of Accountability for post-Modern Policing". *Policing and Society* 12(4), p.323.

<sup>1074</sup> Sheptycki, J. W. E. (1995). "Transnational Policing and the makings of a Postmodern State". *British journal of criminology* 35(4), p. 615.

<sup>1075</sup> Sheptycki, J. (2005). "Transnational Policing". *The Canadian Review of Policing Research* 1, at [www.crpr.icaap.org/index.php/article/view/31/48](http://www.crpr.icaap.org/index.php/article/view/31/48), accessed on 11 August 2018.

<sup>1076</sup> William, J. and E. Sheptycki (2007). *Op.Cit.*, p.490.

<sup>1077</sup> Sheptycki, J. (2005). *Op.Cit.* Online

<sup>1078</sup> Sheptycki, J. W. E. (1995). *Op. Cit.*, p.619.

<sup>1079</sup> Monaco, F. R. (1995). "Europol: The Culmination of the European Union's International Police Cooperation Efforts". *Fordham international law journal* 19, p.260-261.

<sup>1080</sup> Sheptycki, J. W. E. (1995). *Op. Cit.*, p.619.

<sup>1081</sup> Hills, A. (2009). "The possibility of transnational policing". *Policing and Society* 19(3), p.302,



problems of transnational policing. The coercive power of the police in the maintenance of order, the search, arrest and detention of suspects, and intrusive methods of investigation raise major concerns in relation to the rights of citizens and to accountability.<sup>1082</sup> For example, the sharing of false information between the police across two states may lead to responsibility especially when such information sharing results in a refusal to entry a country or even a detention at the borders.<sup>1083</sup> Police actions require legal tools, or they would constitute criminal offences. Detail arrangements for securing adequate data protection safeguards must be put in place to regulate the sharing of information on suspects across national police agencies. Hence, this research views liberal values as essentially universal rather than strictly western values. The legitimacy of a transnational policing system in the EAC will depend on its accountability towards the Community. An accountability framework for policing in the EAC must be established, to allow different segments of the society to exercise control over the governance of the regional policing.

An accountability framework for policing in the EAC must ensure policing practices are democratically accountable and transparent. Such framework should essentially consist of legislation, policies, procedures and initiatives that ensure the regional police is not insulated from public, parliamentary and judicial scrutiny, in addition to internal accountability mechanisms. Firstly, public control can be exercised through citizen review, to make policing accountable to the civil society.<sup>1084</sup> The control may also take the form of public information and include access to documents or the publication of annual reports and press releases on the website of the policing institution.<sup>1085</sup> Secondly, parliamentary control can be achieved by ensuring parliaments' oversight on the regional police. Thirdly, judicial control can be guaranteed by giving courts the mandate to review the decisions of the regional police. The parliamentary and judicial controls might be split between relevant national and regional institutions. It has been noted, in the case of Europol, that the level of accountability gradually decreases as the

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<sup>1082</sup> Maguire, M. (2000). "Policing by risks and targets: Some dimensions and implications of intelligence-led crime control". *Policing and Society: An International Journal* 9(4), p.320.

<sup>1083</sup> Sheptycki, J. (2002). *Op.Cit.*, p.327.

<sup>1084</sup> See Sheptycki, J. (2002). *Op.Cit.*, p.325. Also, Sheptycki, J. (2005). *Op.Cit.*

<sup>1085</sup> De Moor, A. and G. Vermeulen (2010). "The Europol Council decision: transforming Europol into an agency of the European union". *Common Market Law Review* 47, p.1119.

level of regionalisation increases.<sup>1086</sup> The supranationalisation of Europol, particularly the change of its status to an agency of the EU, reduced the power of national parliaments to control Europol.<sup>1087</sup>

The mandate of the regional police will have to include, specifically, the prevention and investigation of transnational crimes. The failure to think about crime prevention and reduction in the discourse about transnational crime and policing has had as effect a reinforced militarization of policing.<sup>1088</sup> While the mandate could be wider and include serious organized crimes and international crimes, the establishment of such agency must be understood primarily within the context of policing transnational crimes as a result of joint policies of the Partner States under the governance of the EAC as a supranational entity.

The lack of a provision for the creation of a common police in the Treaty establishing the EAC, unlike in the EU, suggests that the EAC was probably not fully aware of the extent of the security implications of its common market's policies, particularly the relaxation of borders. The omission can also be seen as a persisting assumption of the state's monopoly on the legitimate use of coercive force in the maintenance of social order within its own territory, an understanding that has changed since the end of the Cold War.<sup>1089</sup> Not surprisingly, EU Member States too were not ready, by the signing of the Europol Convention in 1995, to transfer authority to a supranational entity.<sup>1090</sup> The status of Europol has meanwhile been upgraded from an intergovernmental organization to an agency of the EU, with the power to request national police forces to conduct investigations, the so-called 'right of initiative',<sup>1091</sup> albeit without any real operational power. A regional law enforcement agency for the EAC too should be invested with some forms of supranational powers. Intergovernmentalism and its inherent limited power would significantly prevent such body from achieving considerable results.

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<sup>1086</sup> Tebaldi, M. and M. Calaresu (2013). "Level of Europeanization and Policy Outcomes: The Common Security Policy and the Case of Europol". *Sage Open*, p.13.

<sup>1087</sup> De Moor, A. and G. Vermeulen (2010). *Op.Cit.*, p.1117.

<sup>1088</sup> Sheptycki, J. (2005). *Op.Cit.* online

<sup>1089</sup> William, J. and E. Sheptycki (2007). *Op.Cit.*, p.490.

<sup>1090</sup> Busuioc, M., D. Curtin and M. Groenleer (2011). "Agency growth between autonomy and accountability: the European Police Office as a 'living institution'". *Journal of European Public Policy* 18(6), p.854.

<sup>1091</sup> *Ibid.*, p.856.

Mostly, regional police would provide support in coordinating operations such as controlled deliveries, cross-border surveillances or covert operations much required in complex transnational investigations because of the inherent difficulties and dangers in collecting information and intelligence on the operations of organized criminal groups.<sup>1092</sup> The establishment of such formal institution will ensure the legality of these operations often conducted without the knowledge of the persons concerned. As is argued by Marc Alain, official cooperation agreements formalize practices and information exchange and attempt at diverting horizontal and informal procedure to a controlled formal vertical structure.<sup>1093</sup>

A regional law enforcement organization will be useful for developing effective systems of information sharing on the profile, motives and modus operandi of the offenders, the scope and trends in transnational crime, its impact and the effectiveness of the response to it. In view of the importance of information sharing for the identification of offenders and for the issuing of appropriate sentences, an East African Police would also maintain a computer regional system of databases on criminal records and information systems on persons wanted for arrest or extradition, witnesses, persons put under surveillance, etc. Information exchange and processing naturally involves data protection and implicitly raises human rights concerns that will have to be addressed properly.

In accordance with the EU's experience, this research advances that the establishment of a regional police will prompt the need to create a comparable institution, in the law enforcement, to coordinate investigations and prosecutions of transnational crimes.

#### *5.3.2.2. An East African agency for criminal justice*

There was a feeling, in the EU, that a corresponding unit to Europol was lacking at the prosecution level.<sup>1094</sup> However, the nature of the transnational criminal justice, especially the fact that all procedural acts are carried domestically in the Member States meant that the unit would not be

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<sup>1092</sup> Dandurand, Y. Colombo, G. and N. Passas (2007). "Measures and mechanisms to strengthen international cooperation among prosecution services". *Crime Law and Social Change* 47, p. 279.

<sup>1093</sup> Alain M. (2001). "Transnational police cooperation in Europe and in North America: Revisiting the Traditional Border Between Internal and external Security Matters, or How Policing is being Globalized". *European Journal of crime, Criminal Law and Criminal Justice* 9(2), p.126.

<sup>1094</sup> Souminen, A. (2008). "The Past, Present and the Future of Eurojust". *Maastricht Journal of European and Comparative Law* 15(2), p.220.

invested with real prosecutorial powers. Instead the envisaged unit mingled the prosecution, the police and the judiciary in a single institution acting as a coordinator and an intermediary between the Member States.<sup>1095</sup> While this approach is questionable, it may be justified by the responsibility incumbent to the three professions in the issue and the execution of orders and warrants for evidence and extradition. Hence the unit constitutes a channel through which various instruments for cooperation in criminal matters are exchanged and coordinated among the national authorities competent for issuing and executing them. The establishment of such unit reflects the MR model's break with "outdated" diplomatic channeled and executive oriented cooperation system and the trend towards processes entirely managed by courts systems.

Cooperation in criminal matters in the EAC too requires creating a structure for coordinating criminal justice actions. A respondent to the interviews for this thesis said in this regard: "...institutional set up should be there. ... at least a regional center, a mechanism, a framework should be in place [to be able] to coordinate... ... you need a regional center that could transmit information, coordinate, help settle differences that could arise".<sup>1096</sup> Like the regional police, the structure would be a permanent body of the Community. It would play a central role as the agency for criminal justice. The agency would operate like Eurojust in the EU, with similar attributions. In addition to coordinating cooperation actions in the Community, the agency would play an active role where states fail or where they are not willing to fulfil their obligations. It would also assist the implementation of the proposed warrants for evidence and extradition. Furthermore, the agency would review the Partner States' requests for assistance and ensure they meet the standards and requirements in the proposed warrants.

The mingling of national criminal justice actors into a common regional unit, in the EU, may also reflect the MR model's aim to provide a cooperation means that respects the differences in Member States' legal systems. These differences were first acknowledged in the Liaison Magistrate mechanism established for promoting effective cooperation between national legal systems.<sup>1097</sup> However, the mechanism is profoundly inscribed in the MLA model. It leaves the

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<sup>1095</sup> Patrone, I. (2013). *Op.Cit.*, p.223.

<sup>1096</sup> Interview with Respondent 6.

<sup>1097</sup> See, Joint Action 96/277/JHA on a framework for the exchange of liaison magistrates, Preamble.

choice entirely to Member States to enter bilateral or multilateral agreements to establish it and it essentially operates in the Member States. Although the mechanism's overall impact is positively judged, its limited implementation means a limited impact too. Nevertheless, the mechanism's aim of promoting cooperation between officials specialized in the fight against organised crime signaled early manifestations of the trend towards dialogues between national criminal justice authorities in the EU member States. Such dialogues are described essentially in terms of the effects of globalization and the rethinking of the relationship between law and space, the emergence of new dimensions as well as the construction of legal structures and efforts to address common problems.<sup>1098</sup> They are often referred to as 'judicial dialogues' and they encompass the interactions between not only judges but also prosecutors and other actors in the national court systems.<sup>1099</sup> The dialogues were acknowledged by the respondents to the interviews for this thesis as a well-known practice at the EAC, that brings together the relevant national stakeholders to discuss among themselves, specifically the judiciaries, the prosecution offices and the police.<sup>1100</sup>

Judicial dialogues operate above, across and below the states' level. They occur in three ways: face-to-face interactions, IT-based communication and cross-citations.<sup>1101</sup> Face-to-face direct interaction happens through meetings, usually international conferences, the exchange of judicial delegations or visits and opportunities for networking and sharing experiences.<sup>1102</sup> IT-based dialogue has been fostered by the Internet. It includes the use of legal data bases and online forums where judges and other lawyers can talk and write to each other directly.<sup>1103</sup> Cross-citation involves comparative analysis-citation and discussion of foreign legal precedent.<sup>1104</sup> We can speak of vertical, semi-vertical and horizontal dialogues, depending on the hierarchy of the

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<sup>1098</sup> Ansuateguiroig, F.J. (2016). "Human rights and judicial dialogue between America and Europe: Towards a new model of law?". *The Age of Human Rights* 6, p.25.

<sup>1099</sup> Bogojević, S. (2017). "Judicial Dialogue Unpacked: Twenty Years of Preliminary References on Environmental Matters Initiated by the Swedish Judiciary". *Journal of Environmental Law* 29, p.267.

<sup>1100</sup> Interviews with Respondents 6 and 7.

<sup>1101</sup> Frishman, O. (2013). "Transnational Judicial Dialogue as an Organisational Field". *European Law Journal* 19(6), p.747.

<sup>1102</sup> Waters, M.A. (2005). "Mediating Norms and identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law". *The Georgetown Law Journal* 93,

<sup>1103</sup> Law, D.S. and W-C. Chang (2011). "The limits of global judicial dialogue". *Washington Law Review* 86, p.526.

<sup>1104</sup> Waters, M.A. (2005). *Op.Cit.*, p.492.

courts engaged in the dialogues, for example dialogues between international or regional courts and national courts, or between higher and lower national courts, between national courts at the same level, as well as dialogues between foreign courts.<sup>1105</sup> The latter, dialogues between foreign courts across borders, referred to as transnational judicial dialogues or transjudicial dialogues,<sup>1106</sup> is described as a distinctive feature of the present age.<sup>1107</sup> It is applied, in this chapter, as a criterium for determining the relevance of institutions discussed above. Transnational dialogues involve emerging transnational issues, such as transnational crimes, and they are based on a sense of common enterprise in addition to other dimensions defining a region.<sup>1108</sup> It can be said that the establishment of the EJC, particularly its aim of promoting direct contacts between judges and prosecutors and links between national central authorities marked a step forward in furthering transnational judicial dialogues in the EU. However, like the Liaison Magistrate, the EJC operates in the Member States, does not have a legal personality and is essentially anchored in intergovernmentalism, giving space to states and structures more than individuals and actual actors.

While this thesis recognizes the important effects of transnational judicial dialogues in enhancing cooperation in criminal matters, it argues that the dialogues must be organised in the same institution responsible for coordinating actions in criminal justice cooperation, in the case of the EAC the proposed agency for criminal justice. Such orientation naturally fits in with the kind of cooperation conducted directly between competent national authorities as proposed in this research. The concentration of various functions in a single agency in the EAC will prevent unnecessary multiplication of institutions. Above all, it will cast all cooperation efforts under the banner of a single supranational institution and avoid the divide observed in the EU model. The EAC agency for criminal justice would coordinate not only cooperation actions, but also dialogues between national authorities in respect of transnational organized crimes. It would serve as a

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<sup>1105</sup> Ansuateguiroig, F.J. (2016). *Op.Cit.*, p.30.

<sup>1106</sup> Vogler, R. (2014). "Criminal Evidence and Respect for Fair Trial Guarantees in the Dialogue Between the European Court of Human Rights and national courts". In: Ruggeri, S. (Ed.). *Transnational Evidence and Multicultural Inquiries in Europe*. Springer. London, p.182.

<sup>1107</sup> Kirby, M. (2008). "Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges". *Melbourne Journal of International Law* 9, p.171.

<sup>1108</sup> Waters, M.A. (2005). *Op.Cit.*, p.492, 495.

platform for discussing cooperation requests to avoid possible hindrances. The agency would also hold periodical and regular meetings of national authorities for exchanging experiences and practices in the investigation and the prosecution of transnational organized crimes, and in the handling of related cases. It would facilitate information exchange between national authorities, for a better knowledge of foreign legal systems and for promoting mutual understanding and trust. The agency would also constitute a means for multidirectional dialogues and joint meetings between national authorities in their various professions.

Supposing the EAC adopts a MR model of cooperation in criminal matters, the Partner States will be required to grant assistance and extradition requests as an obligation imposed on them with limited possible grounds for refusal. In this case, the agency for criminal justice would monitor and report the Partner States' compliance with this obligation to execute, including compliance with time-limits for responding to requests. The Partner States would be answerable to the agency for any breach of the obligations above.

Transnational proceedings are naturally complex. The involvement of more than one state raise practical issues, such as conflicts of jurisdiction, on which states may not compromise. The agency for criminal justice in the EAC may be given supranational attributes to settle conflicts arising between national courts of the Partner States. The conflicts may essentially be twofold. Positive conflicts of jurisdiction involve two or more states with competing jurisdiction over the case and willing to exercise their jurisdiction, whereas negative conflicts of jurisdiction involve two or more states with jurisdiction over the case but neither state is willing to exercise it.<sup>1109</sup> In the first case, the agency for criminal justice may be empowered to decide which national court has jurisdiction over the case and to enforce acceptance of its decisions. This assignment of jurisdiction means the choice of the forum and the applicable law as well as the assignment of the power to investigate, prosecute and adjudicate. It has several implications on the suspects, accused and witnesses who may be exposed to a foreign court, legal system and language they are not familiar with. The interests of the defence must be taken care of at this instance of decision-making, for equality of arms with the prosecution. The power of the agency for criminal justice must ensure

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<sup>1109</sup> Zimmermann, F. (2015). "Conflicts of Criminal Jurisdiction in the European Union". *Bergen Journal of Criminal Justice* 3(1), p.2.

the defence is associated in the decision-making process and heard in all decisions affecting its interests.

In the second case, the agency may be empowered to formally request a state to investigate and prosecute a case. This supranational power to trigger investigations and prosecutions in the states is much needed to prevent impunity for transnational crimes. However, the enforcement of the power to deter transnational crimes and the consequent increase of states' *jus puniendi* must not be done to the detriment of the rights of the accused and suspects. On this aspect, the EU criminal justice attracted criticisms for being driven by states' interests and for solely focusing on the prosecution and increasing its power with specialised networks.<sup>1110</sup> The criticisms deplore the lack of a corresponding network for defence lawyers.<sup>1111</sup> Much as scholarly debates advocate the establishment of such network for defence lawyers and put forward proposals such as Eurodefence<sup>1112</sup> for ensuring the rights of the defence are respected and procedures and laws are properly applied in instances such as Eurojust, the experience of the EU reveals a divided opinion among defence lawyers and an opposition to the involvement of states, and the EU, in matters of the defence.<sup>1113</sup> This is not to dismiss the idea of a similar network for the defence in the EAC. Rather, this research acknowledges the need to ensure the defence is represented before the agency for criminal justice in respect of proceedings and decisions affecting its rights.

As argued in chapter four, a great deal of transnational crime involves officials, especially those in position of power. The situation can be particularly exacerbated in countries with a high level of corruption, such as those of the EAC. Corrupt official and those involved in transnational networks may obstruct investigations and prosecutions of specific cases. It is argued that a great effort of police in national jurisdictions, in the 1990s, focused on ordinary suspects of transnational crimes, leaving wide scope for many transnational networks actors, especially

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<sup>1110</sup> Wade, M. L. (2015). "Securing Defence Rights in Transnational Proceedings". *European Journal of Crime, Criminal law and Criminal Justice* 23, p.153.

<sup>1111</sup> Buric, Z. (2016). "Transnational criminal proceedings and the position of the defence". In: Z. Đurđević and E Ivičević Karas (eds), *European Criminal Procedural Law in Service of Protection of European Union Financial Interests: State of Play and Challenges*. Croatian Association of European Criminal Law, p.65.

<sup>1112</sup> Schünemann, B. (2014). "Solution Models and Principles Governing the Transnational Evidence-Gathering in the EU". In: Ruggeri, S. (Ed.). *Transnational Evidence and Multicultural Inquiries in Europe*. Springer. London, p.173. Also, Buric, Z. (2016). *Op.Cit.*, p.65.

<sup>1113</sup> Wade, M. L. (2015). *Op.Cit.*, p.154.



those in power.<sup>1114</sup> Empowering the agency for criminal justice with supranational attributes to trigger investigations and prosecutions of transnational crime cases in the EAC will remedy the deficiencies associated with poor knowledge of transnational crime and flawed investigations and prosecutions in the region.

As a body entrusted with the coordination of cooperation actions, the agency for criminal justice in the EAC would be given access to national criminal records to prevent multiple prosecutions and convictions of the accused in the same cases. The rights of suspects and accused, particularly the protection against double jeopardy, may be seriously compromised where transnational proceedings are uncoordinated. This question and overall human rights issues are examined in the next section as essential conditions for effective cooperation in the EAC.

#### 5.4. Requirements for the EAC

The cooperation model, the mechanisms and the institutions proposed in this research would be meaningless if they were not embedded in a criminal justice system understood as a crime control system with protection for those affected against the abuse of investigatory and prosecution powers.

##### 5.4.1. A transnational criminal justice

Cooperation in criminal matters in the EAC requires a criminal justice system beyond the classic concepts of national jurisdictions, to establish new competences in respect of the mechanisms proposed in this research and to enable collaboration between national criminal justice authorities across borders. The research views transnational crime as the starting point for both cooperation and the constitution and the imagining of a transnational criminal justice system<sup>1115</sup> in the EAC.

Although this research finds necessary the establishment of a transnational crime justice system in the EAC, it also recognizes the implications of such system in terms of a complicate governance as transnational crime is at same time considered an issue in domestic criminal justices. The complications stem partly from the procedural dilemmas generated by transnational crime in

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<sup>1114</sup> Sheptycki, J. (2005). *Op.Cit.*

<sup>1115</sup> See, Nieto, D. (2012). "Neoliberalism, Biopolitics and the Governance of Transnational Crime". *Colombia Internacional* 76, p.144.

respect of its investigations and prosecution. Transnational crimes transcend more than one country in their planning, execution and impact, and because of their multinational characteristics, they are different from national and international crimes.<sup>1116</sup> Further complications relate to the lack of a unified body of transnational criminal law. There are no international or supranational criminal laws or codes of criminal procedure to guide the EAC in this endeavor.<sup>1117</sup> To date there has been no agreement on what the general principles for transnational criminal proceedings should be.<sup>1118</sup> The lack of a comprehensive set of rules governing transnational criminal justice is essentially explained by the fact that national laws have not been designed to cope with the transnational aspects of criminal justice.<sup>1119</sup> Besides, there have been controversies on the scope and application of transnational law, in particular whether all laws, national and international law regulating actions and events that transcend national borders would be part of it, or whether transnational law is conceptually different from national and international law.<sup>1120</sup> Another controversy is whether the content of transnational law should emphasize substance or procedure. Harfield notes that what would be a governance void in the transnational context is particularly filled with instruments, if not of governance, at least of facilitation.<sup>1121</sup> This can be illustrated by the plethora of legislative instruments for facilitating cooperation between national authorities, that the EU has come up with in the last two decades.

Despite the lack of general principles of transnational criminal law, this research argues that a transnational criminal justice in the EAC can be drawn on the European criminal justice as a particular form of transnational criminal law. Accordingly, a transnational criminal justice in the EAC will have to preserve national jurisdictions and competence in criminal law. This means adjudication in the East African criminal justice would be the exclusive competence of the Partner

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<sup>1116</sup> Coffey, G. (2013). *Op.Cit.*, p.61-62.

<sup>1117</sup> See, Harfield, C. (2011). "Transnational Criminal Investigation and Modes of Governance". *Policing* 5(1), pp.3-14, p.6.

<sup>1118</sup> Bachmaier Winter, L. (2013). "Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR's Case Law". *Utrecht Law review* 9(4), p.128.

<sup>1119</sup> Gless, S. and J.A.E. Vervael (2013). "Law Should Govern: Apsiring General Principles for Transnational Criminal Justice". *Utrecht Law Review* 9(4), p.1, 4.

<sup>1120</sup> Cotterrell, R. (2012). "What Is Transnational Law?". *Law & Social Inquiry* 37, p.500.

<sup>1121</sup> Harfield. C. (2011). *Op.Cit.*, p.6

States.<sup>1122</sup> Consequently, all prosecutions and trials would be national.<sup>1123</sup> These attributes of transnational criminal justice are influenced by the understanding of law, since the Treaty of Westphalia in the 17th century and the rise of sovereign states, as an essential element of national construction.<sup>1124</sup> In particular, criminal law and police matters are perceived as intrinsic to national sovereignty.<sup>1125</sup> Paradoxically, it is also argued that we now live in an age of transnationalism<sup>1126</sup> and that law has spilled out beyond the borders of the nation states in various fields<sup>1127</sup> including International Criminal Law.<sup>1128</sup> Transnational crime is essentially the driving force behind transnationalism, in International Criminal Law, giving rise to various forms of crime control at the transnational level. Sperling attributes the contrast between the collective action and the resistance to surrender significant sovereign policing or judicial prerogatives in transnational criminal justice to the post-Westphalian evolution of states which he describes as both cause and symptom of states' difficulty to cope with transnational crime.<sup>1129</sup>

The principle of MR supposes the existence of a common criminal law or policy, at least in respect of offences that would be subject of extradition and evidence warrants proposed in this research. In the absence of a unified body of transnational criminal law, harmonization or the requirement that all states have same laws, produces equivalent laws in national criminal justices and therefore facilitates cooperation.<sup>1130</sup> Harmonisation has been recognized by the respondents to the interviews for this thesis as a crucial means for minimizing differences in the national legal systems in general and the criminal justices in particular. E.g., a respondent said "We should now be looking on how to harmonize the legal systems in East Africa so that we are not operating

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<sup>1122</sup> Luchtman, M. and J. Vervaele. (2014). "European Agencies for Criminal Justice and Shared Enforcement (Eurojust and the European Public Prosecutor's Office)". *Utrecht Law Review* 10(5), p.132.

<sup>1123</sup> *Ibid.*

<sup>1124</sup> Shaffer, G. (2012). "Transnational Legal Process and State Change". *Law & Social Inquiry* 37, p.232.

<sup>1125</sup> *Ibid.*

<sup>1126</sup> *Ibid.*, p.229.

<sup>1127</sup> Cotterrell, R. (2012). *Op.Cit.*, p.500.

<sup>1128</sup> See Turner, J.L. (2007). "Transnational Networks and International Criminal Justice". *Michigan law Review* 105(5), p.985.

<sup>1129</sup> Sperling, J. (2013). "EU police and judicial cooperation before the Treaty of Lisbon: Strengthening of the weakest link?". *European Security*, 22(2), p.204.

<sup>1130</sup> Mann, M. Warren, I & S. Kennedy (2018). "The legal geographies of transnational cyber-prosecutions: extradition, human rights and forum shifting". *Global Crime*, 19(2), p.108.

using different legal systems...”.<sup>1131</sup> Another respondent recalled that harmonisation is applied as a principle in the EAC Common Market.<sup>1132</sup> One of the justifications put forward in support of harmonization is the issue of death penalty that a respondent explained in the following terms: “What happens if a suspect is apprehended in Rwanda and through that cooperation we have to extradite him to Kenya where they have death penalty, what would happen, does Rwanda say “no” and would this be regarded as cooperation?”.<sup>1133</sup> Harmonization of criminal and procedural laws as well as core procedural rights fosters mutual trust. However, how far national criminal and procedural laws should be harmonized has been a subject of controversy. Harmonization needs not to be understood as full-scale unification.<sup>1134</sup> Instead, it means approximation or coordination of laws or systems by eliminating major differences. The approximation of criminal laws, particularly in respect of transnational crime, means adjustment to a common standard.<sup>1135</sup> It transpires from the respondents’ reference to terms such as approximation, that harmonisation as understood in the EAC too does not mean equalization. A respondent to the interviews recalled that “even in the United States which is a political federation, their laws are not equal. Some states have death penalty other don’t, but at least they have something which is a bit more uniform”.<sup>1136</sup> Harmonization or approximation simplifies the application of laws since more or less same laws would apply throughout the region. Furthermore, harmonization helps to agree on the criminalization at least of the most serious offences and to arrive at similar definitions of offences as well as sentences. In the EU, Articles 82 and 83 TFEU, respectively, provide explicit legal bases for the approximation of criminal procedural laws and the establishment of minimum rules concerning the definition of criminal offences and sanctions for serious crimes with cross-border dimensions. Legal texts have been adopted on trafficking in

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<sup>1131</sup> Interview with Respondent 1.

<sup>1132</sup> Interview with Respondent 3.

<sup>1133</sup> Interview with Respondent 7.

<sup>1134</sup> Raffaelli, R. (2017). *Op.Cit.*, p.2.

<sup>1135</sup> *Ibid.*

<sup>1136</sup> Interview with Respondent 7.

human beings,<sup>1137</sup> exploitation of children and child pornography,<sup>1138</sup> terrorism,<sup>1139</sup> money laundering<sup>1140</sup>, computer crime,<sup>1141</sup> environmental crime<sup>1142</sup>, fraud and counterfeiting<sup>1143</sup>, etc., in order to arrive at similar definitions of offences and harmonise the level of penalties.<sup>1144</sup>

A common understanding of legal concepts, such as transnational crime, serious crime, organized criminal networks, participation in a criminal organization, proceeds of crime or predicate offences, for example, would provide solid and essential grounds for cooperation in the EAC. In respect of sentences, harmonization could be achieved through common minimum rules on the types of sentences, for example, custodial sentences, financial penalties, disqualifications -such as prohibitions on entering a country or exercising specific occupation-, and confiscations of assets derived directly from or substituted to the offences. Equally, the modes of enforcement of sentences should be standardized, specifically, the threshold for custodial sentences in terms of maximum and minimum imprisonment, different forms of remission and provisional release including conditional release, suspended sentences, etc.

There would be the need to address core aspects related to the commission of offences. Specifically, theories related to the level of participation and completion of offences should at best be harmonised. Similarly, the common forms of participation, namely aiding and abetting

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<sup>1137</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

<sup>1138</sup> Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.

<sup>1139</sup> Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA

<sup>1140</sup> See, Directive (EU) 2015/849 of the European Parliament and of the Council, of 20 May 2015, on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC.

<sup>1141</sup> See, Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA

<sup>1142</sup> See, Directive 2008/99/EC of the European Parliament and of the Council, of 19 November 2008, on the protection of the environment through criminal law.

<sup>1143</sup> See, Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law.

Also, Directive (EU) 2019/713 of the European Parliament and of the Council, of 17 April 2019, on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA

<sup>1144</sup> Raffaelli, R. (2017). *Op.Cit.*, p.2-3.

and complicity should be harmonised too. The approximation of sentencing practices for main offenders, accomplices, joint offenders or instigators may ensure that transnational crime is equally prosecuted and punished in the region. Furthermore, the approximation of sentencing practices means a common system in which criminal law theories that have an impact on the sentence, such as attempt, aggravating and mitigating or exonerating circumstances, recidivism and concurrent offences are evenly applied to avoid excessive disparities between the national legal systems and ensure equivalent punishment of transnational crimes offenders in the region.

The criminal liability of legal persons (corporate liability) too presents many challenges in international cooperation. Corruption and various other crimes can be committed by a company or by criminal organizations acting under the cover of a legal entity. Regional efforts in the EAC should be directed towards suppressing or at least minimizing the variations in national laws' definitions and regulations of corporate liabilities.

A common approach to offences, sentences and related theories would give the public a shared sense of justice.<sup>1145</sup> It would signal that certain conducts such as trafficking in human beings, in drugs, or other forms of transnational crimes are unacceptable and equally punished across the region.<sup>1146</sup> It would also reduce criminal networks' attempts and hopes to evade prosecution or enforcement of sentences since similar regimes would apply throughout the region. Furthermore, a standardized approach across the region would provide citizens with effective and equivalent protection against acts that violate the principles and values shared by the Partner States. The objective of a common criminal law or policy must be to ensure there are no safe havens for criminals in the EAC. In view of the freedom of movement in the EAC, the criminal law or policy must reconcile efficiency and respect of such principle as *ne bis in idem*.

#### 5.4.2. *Ne bis in idem*

The *ne bis in idem* principle, or the prohibition against double jeopardy, is recognized in most national criminal justices. The principle has also been codified as a constitutional right in many criminal justices, including those of the EAC. *Ne bis in idem* means a person should not be

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<sup>1145</sup> Commission of the European Communities (2004). Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union. Bruxelles, p.9.

<sup>1146</sup> *Ibid.*

punished or prosecuted twice by the court or the prosecution authorities of the same state and for the same offences if the case has been finally decided.<sup>1147</sup> There is no rule of International Law imposing *ne bis in idem*.<sup>1148</sup> Its application is purely conventional.<sup>1149</sup> The main sources of *ne bis in idem* in Public International Law are found in International Human Rights Law (For example, article 14 ICCPR), the law regulating international criminal tribunals and multilateral treaties on cooperation in criminal matters.<sup>1150</sup>

Despite its Public International Law legal basis, *ne bis in idem* was conceived to apply nationally in domestic settings, and not internationally.<sup>1151</sup> This means that, in theory, individuals can be tried and punished for the same offence by the courts of more than one country. This raises concerns in the context of transnational criminal justice. With the free movement of persons, goods, services and capital in the EAC, a domestic *ne bis in idem* would not protect individuals against the risk of being tried or punished more than once for the same offences, since national courts may not be bound or willing to test the *ne bis in idem* dimension in transnational proceedings.

Concerns over *ne bis in idem* in a transnational setting also stem from the variances in the national criminal justice systems' interpretation of the substantive meaning of the principle, whether it prohibits double punishment and double investigation and prosecution.<sup>1152</sup> Particularly, the focus on *res judicata* in the classic formulation of the *ne bis in idem* principle has been the subject of debate on the scope of the principle, as to whether it includes out of court settlements too.<sup>1153</sup> Consequently, the lack of a common standard on *ne bis in idem* leaves individuals without an adequate and equivalent protection, especially in the regional context

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<sup>1147</sup> Coffey, G. (2013). *Op.Cit.*, p.63.

<sup>1148</sup> Vervaele, J.A.E. (2013). "*Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?*". *Utrecht Law Review* 9(4), p.213.

<sup>1149</sup> *Ibid.*

<sup>1150</sup> *Ibid.*

<sup>1151</sup> *Ibid.*, 212

<sup>1152</sup> Vervaele, J.A.E. (2005). "The transnational *ne bis in idem* principle in the EU Mutual recognition and equivalent protection of human rights". *Utrecht Law Review* 1(2), p.100-101.

<sup>1153</sup> *Ibid.*, p.100.

such as the EAC with its single territory and related freedoms of movement.

The FD EAW contains a *ne bis in idem* provision. By contrast, neither the EU 2000 MLA Convention nor its additional protocol of 2001 contain a similar provision. While a *ne bis in idem* provision is included in the EIO, it remains an optional ground for refusal. This contrast in the applicability of the *ne bis in idem* between extradition and MLA perhaps suggests that the principle is more accepted in extradition and the deprivation of liberty than in MLA even with the possibility of coercive measures.<sup>1154</sup>

The first time ever *ne bis in idem* was established as an individual right *erga omnes* with an international or transnational effect was the adoption of the 1990 CISA (Chapter 3, Articles 54-58), following the creation of the Schengen area among the EC states and consequent abolition of internal border controls.<sup>1155</sup> The incorporation of the Schengen agreements into the EU law by the Treaty of Amsterdam, entered into force in 1999, created a transnational *ne bis in idem* principle<sup>1156</sup> for the twenty six participating states, of which twenty two EU Member States and four members of the EFTA who have association agreements with the Schengen area, namely Norway, Switzerland, Iceland and Lichtenstein. The transnational *ne bis in idem* principle is also stated in Article 50 CFREU, entered into force in 2009, and it constitutes, therefore, a binding fundamental right.<sup>1157</sup> The *ne bis in idem* provisions of the CISA (Article 54) and the CFREU (Article 50) appear similar in most respects, their difference being the 'enforcement clause' added in Article 54 CISA and which is omitted in Article 50 CFREU. This difference raises questions about the relationship between the two provisions, that is between primary and secondary law, when interpreting them.<sup>1158</sup> The pre-Lisbon *acquis* of Article 54 CISA is part of secondary European law while the CFREU and the rights contained therein constitute primary European law.<sup>1159</sup>

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<sup>1154</sup> Vervaele, J.A.E. (2013). *Op.Cit.*, p.216.

<sup>1155</sup> *Ibid.*, p.218.

<sup>1156</sup> *Ibid.*, p.219

<sup>1157</sup> *Ibid.*, p.210-220.

<sup>1158</sup> Burchard, C. and D. Brodowski (2010). "Post-Lisbon principle of transnational *ne bis in idem*: On the relationship between article 50 charter of fundamental rights and article 54 convention implementing the schengen agreement: Case note on district court aachen, germany, (52 ks 9/08 boere), decision of december 2010". *New Journal of European Criminal Law*, 1(3), p.312 and 319.

<sup>1159</sup> *Ibid.*, p.311 and 312.



The question for the EAC is how best the Community can establish a transnational *ne bis in idem* principle to protect citizens against double jeopardy and to enable them to fully enjoy the freedoms provided in the Common Market Protocol. A lesson learned from the EU cooperation system is that, firstly, a *ne bis in idem* principle with a transnational reach must be established as a constitutional legal principle in the Community. The freedom of movement in the EAC would seriously be undermined if convicted persons who have served their sentences had to fear prosecutions in other Partner States. The multiplicity of legal bases for *ne bis in idem* in the European cooperation system posed a considerable challenge, in so far as all of them, except the CFREU's provision, suffer exceptions, derogations, or reservations formulated by Member States against their application. Secondly, the transnational *ne bis in idem* must be recognized as a binding fundamental right in a human rights framework, which the EAC does not have of its own until now. This concern and broader human rights issues are further discussed in the next section.

#### 5.4.3. Human rights considerations

Respect for fundamental rights was not prominent in the traditional MLA model of cooperation<sup>1160</sup> historically rooted in an era prior to strict consideration of human rights.<sup>1161</sup> The MLA model does not consider the individual as a subject but as the object of cooperation between states.<sup>1162</sup> As compliance with human rights became subject of greater scrutiny, concerns have been raised about their application to the various processes by which states assist each other in fighting transnational crime.<sup>1163</sup> These processes, including legal mechanisms such as warrants and orders, and institutional means for the investigation and prosecution of transnational crime, are viewed as part of a governance system, the transnational criminal justice, with considerable implications on the rights of individuals, natural and legal persons alike. The system came about from what is seen as the legitimate interest of states to fight transnational crime through joint efforts.<sup>1164</sup> It aims at ensuring perpetrators may not evade

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<sup>1160</sup> Bertrán de Felipe, M. and A. Nieto Martín (2012). "Post 9/11 Trends in International Judicial Cooperation". *Journal of International Criminal justice* 10, p.588.

<sup>1161</sup> Schünemann, B. (2014). *Op.Cit.*, p.167.

<sup>1162</sup> *Ibid.*

<sup>1163</sup> Currie, R.J. (2000). "Human rights and international mutual legal assistance: Resolving the tension". *Criminal Law Forum* 11, p.143.

<sup>1164</sup> Wade, M. L. (2015). *Op.Cit.*, p.156.

justice as a result of the contrast between their mobility and the traditional territorial boundaries of agencies pursuing them.<sup>1165</sup> This resulted, in the EU cooperation, in a focus on the prosecution first before due consideration could be given to defence rights. The situation attracted strong criticisms about inequality of arms between the prosecution and the defence and the weakening of the structural position of the defence.<sup>1166</sup> In particular, providing the prosecution with specialised networks and supranational measures to which the defence had no access<sup>1167</sup> or the possibility to contest, let alone influence, decisions affecting its interests or even its constitutional rights lead to conclusions that transnational criminal justice sidelines defence rights and is more concerned with efficiency of prosecution than defence rights.<sup>1168</sup> These developments need to be put in perspective with the nature of transnational criminal law, as a specialized form of criminal law in which sovereignty is still a dominant value.<sup>1169</sup> Hence rights and safeguards in transnational criminal justice are strongly related to domestic processes.<sup>1170</sup> However, the effects of transnational crime cannot be dealt with properly at national level. Transnational proceedings are different in nature to domestic one and potentially bigger. They involve the bundled powers of many states often supported by supranational institutions and drawn upon intelligence from the constituent states.<sup>1171</sup> Besides, international and national human rights laws were not made to cope with the transnational aspects of criminal justice.<sup>1172</sup> They cannot provide sufficient protection at transnational level. The constitutional values in national rights protection systems derive from global or international human rights instruments although the opposite too is the case, e.g. the provisions of the ECHR were developed from national systems and, as Article 6(3) TEU records, fundamental rights in EU law may derive from "the constitutional traditions common to the Member States ". As far as these instruments are concerned, their primary

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<sup>1165</sup> Wade, M. L. (2013). "General Principles of Transnational Criminal justice? Exploratory Reflections". *Utrecht Law Review* 9(4), p.168.

<sup>1166</sup> Buric, Z. (2016). "Transnational criminal proceedings and the position of the defence". In: Đurđević, Z and E. Ivičević Karas (Eds), *European Criminal Procedural Law in Service of Protection of European Union Financial Interests: State of Play and Challenges*. Croatian Association of European Criminal Law, p.64

<sup>1167</sup> Ibid., p.64-65.

<sup>1168</sup> Wade, M. L. (2015). *Op.Cit.*, p.155-156.

<sup>1169</sup> Wade, M. L. (2013). *Op.Cit.*, p.165.

<sup>1170</sup> Wade, M. L. (2015). *Op.Cit.*, p.164.

<sup>1171</sup> Wade, M. L. (2013). *Op.Cit.*, p.166.

<sup>1172</sup> Gless, S. and J.A.E. Vervael (2013). *Op.Cit.*, p.1.

function is to secure human rights in the justice systems of the contracting states.<sup>1173</sup> Consequently, differences in national human rights protection systems are totally acceptable as long as protection is provided in a balanced way within the logic of a country's legal system.<sup>1174</sup> Nevertheless, differences in national human rights regimes make them incompatible and may cause defendants to lose rights. The drafting of the CFREU, in the EU, indicates the desire for Member States to adopt a more concrete rights protection standard for the Union. However, it is surprising that the CFREU, drafted amid today's challenges of cooperation in transnational crime and significant developments in the EU criminal justice, does not make specific provisions for transnational rights and guarantees, except the provision on *ne bis in idem* (Article 50), which in itself constitutes an acknowledgment of the transnational aspects of justice in the EU.<sup>1175</sup> The Charter sets out a range of rights of European citizens and all residents in the EU. While Article 50 is not specifically directed at transnational criminal proceedings, it extends the *ne bis in idem* principle throughout the Union, making it operate between the courts of the Member States.

In order to remedy the deficiencies in human rights protection at the transnational level, the EU adopted, in 2009, the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.<sup>1176</sup> The document identified six rights areas for regulation: translation and interpretation, information on rights and information about the charges, legal advice and legal aid, communication with relatives, employers, and consular authorities, special safeguards for suspected or accused persons who are vulnerable, and pre-trial detention. The Roadmap is a schematic model that proposed a one step at a time approach which resulted in the adoption of directives on each of the six areas so far. Nevertheless, it is criticized for basing on the rights guaranteed in the ECHR and thus falling short of addressing the specificities of transnational proceedings.<sup>1177</sup>

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<sup>1173</sup> See, Gless S. (2013). "Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approaches to General Principles". *Utrecht Law Review* 9(4), p.93 and 94

<sup>1174</sup> Wade, M. L. (2015). *Op.Cit.*, p.167.

<sup>1175</sup> Gless S. (2013). *Op.Cit.*, p.93, 103.

<sup>1176</sup> Rijken, C. (2010). "Re-balancing security and justice: Protection of fundamental rights in police and judicial cooperation in criminal matters". *Common Market Review* 47, p.1489.

<sup>1177</sup> *Ibid.*, p.1490.

The need to agree on common values accepted by all and a common standard in a transnational setting is particularly important in the EAC in view of the current lack of a minimum level of fundamental rights and procedural safeguards throughout the Community. Such deficiency calls to question the political will of the Community's leadership in matters of human rights, since neither a human rights instrument for the Community has been agreed upon, nor has the jurisdiction of the EACJ been extended to human rights, both matters having been tabled for discussion at the highest level of the Community for many years. Article 6 EAC Treaty prescribes, as a fundamental principle, the recognition, promotion and protection of human rights in accordance with the provision of the ACHPR. However, none of the six EAC Partner States recognizes the competence of the ACTHPR to receive cases from individuals and NGOs. While Rwanda and Tanzania previously made the declaration under Article 34(6) of the African Court's Protocol accepting the competence of the Court to receive cases from individuals and NGOs, the two states withdrew their declaration in February 2016 and November 2019, respectively.

Without a judicial power to scrutinize the EAC Partner States' respect for human rights at the regional level, the Community's 'commitment' to human rights remains a dead letter and citizens' rights and freedoms unprotected. The need for a human rights instrument specific to the EAC is even greater since the ACHPR cannot provide a sufficiently tight protection in respect of transnational proceedings, should the Community trigger cooperation in criminal matters. The human rights deficiencies in the EAC could actually be turned into an opportunity to agree on common values in the Community and legislate on a human rights instrument applicable both in national and transnational settings. The ACHPR, drafted in the context of decolonization and liberation of Africa, had in mind the protection of human rights nationally. Cooperation in criminal matter requires rethinking rights anew in light of structural changes in the region and regional challenges, specifically transnational crime.

If the EAC opts to criminalize transnational crime, facilitate coercive measures in evidentiary matters and the arrest of criminals and the surrender of individuals for trial and imprisonment in the Partner States, it must effectively protect the rights of those affected. The mechanisms proposed in this research cannot be viewed in isolation. Legislating for arrest as well as the collection and exchange of evidence to become effective across the borders, and the transfer of

repressive powers to supranational institutions must be accompanied by an appropriate right securing system.<sup>1178</sup> The EAC can achieve this only if it recognizes that transnational proceedings put individuals at greater, not lesser, risks than national proceedings. Care must be given to defense rights and procedural safeguards. In particular, fair trial must be guaranteed. A defendant's right to fair trial may be jeopardized if they do not understand or speak the foreign language in a transnational proceeding, or should they not benefit assistance in interpretation and translation of both oral and written statements. Crucial for fairness in transnational proceedings is the right to legal assistance and access to a lawyer, given the exposure of the defendant to a foreign legal system and possibly to the power of many national criminal justice agents working together. The requirement of equality of arms too must be preserved, especially the opportunity for the defense to challenge evidence gathered abroad, including confronting witnesses residing abroad. An essential notion of fairness, the adversarial character of the proceedings, must be guaranteed in transnational proceedings, to avoid what Ricard Vogler calls the fall of the adversarial criminal process in reference to international criminal justice.<sup>1179</sup> There must be due process for transnational investigation, prosecutions and consequent trials.

### 5.5. Adverse consequences of transnational criminal justice on the EAC

While transnational criminal justice can have beneficial aspects, there are also potential downsides. The primary challenges to the establishment of transnational criminal justice are linked to the following main issues: sovereignty and financial cost.

The sovereignty challenge to transnational criminal justice stems from the perception of criminal law and police matters as intrinsic to national sovereignty. The same perception was deplored by the respondents to the interviews for this thesis who identified sovereignty as one of the main challenges to developing cooperation in criminal matters in the EAC. E.g., a respondent said: "...the biggest problem is the whole idea of sovereignty".<sup>1180</sup> Another said: "The first and most difficult thing is the question of sovereignty".<sup>1181</sup> Another one said: "...the first major challenge

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<sup>1178</sup> See, Wade, M. L. (2015). *Op.Cit.*, p.168.

<sup>1179</sup> Vogler, R. (2011). "Making International Criminal Procedure Work: From Theory to Practice". In: Henham, R. and M. Fimdlay (Eds.). *Exploring the Boundaries of International Criminal Justice*. Aldershot, Ashgate, p.105.

<sup>1180</sup> Interview with Respondent 2.

<sup>1181</sup> Interview with Respondent 5.

is the issue of sovereignty”.<sup>1182</sup> As argued in section 5.1 above, criminal law has long been attributed a national character and it has been considered as the exclusive competence of sovereign states. It is still argued today that criminal law is strictly connected to state sovereignty and that national policies and legal traditions are closely related to the state’s monopoly to impose punishment.<sup>1183</sup> This is not unproblematic for transnational criminal justice. Firstly, its complex nature is such as the supranational legal order and the national legal orders are highly intertwined.<sup>1184</sup> Secondly, and more importantly, transnational criminal justice requires states to cede or pool their sovereignty or the control of their international activities to supranational bodies.<sup>1185</sup> This may raise concerns about loss of national sovereignty and identity, given the uniqueness of national traditions and the friction that legitimate political choices such as death penalty, trials in absentia, or the prosecution of juvenile offenders may cause among the criminal justice systems involved.<sup>1186</sup> The proposed mutual recognition instruments, specifically the arrest and evidence warrants, would facilitate the enforcement across the EAC’s internal borders of decisions that are a product of Partner States’ domestic criminal justice systems. This situation too may raise more concerns about the scope of the future EAC criminal law. Another source of potential public concerns on sovereignty could be transnational dialogues and their perceived influence on judges’ constitutional decisions.<sup>1187</sup>

Establishing transnational criminal justice in the EAC requires thinking coherently about questions of financial costs and the impact of the Community’s involvement in criminal justice sphere. As argued by Estella Baker, criminal justice cannot be delivered without financial cost.<sup>1188</sup> The model proposed in this research, namely MR, and subsequent mechanisms and measures all bear a price. Starting with the proposed institutions so fundamental to a functional transnational

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<sup>1182</sup> Interview with Respondent 7.

<sup>1183</sup> Suominen, A. (2017). “Brexit and EU criminal law- The Norwegian approach”. *Criminal Law Forum* 28(2), p.251.

<sup>1184</sup> See, Ambos, K. and S. Bock (2017). “Brexit and the European criminal justice system- An introduction”. *Criminal Law Reform* 28, 192.

<sup>1185</sup> See, Wilson, T.J. (2016). “Criminal Justice and Global Public Goods: The Prüm Forensic Biometric Cooperation Model”. *The Journal of Criminal Law* 80(5), p.322.

<sup>1186</sup> Turner, J.L. (2007). *Op.Cit.*, p.1021

<sup>1187</sup> *Ibid.*, p.1027

<sup>1188</sup> Baker, E. (2016). “What price criminal justice in the EU”. *European Journal of Crime, Criminal Law and Criminal Justice* 24(2-3), p.96.

criminal justice in the EAC, the police and the agency for criminal justice, their establishment would require the Community committing significant amount of money from tax revenues to build and fund them as part of its supranational apparatus. As for the proposed arrest and evidence warrants, their issue and execution would rely on national agencies' resources, which cannot be deployed without minimum expenditure. In a way, implementing the warrants would constitute a claim on domestic budget to fund transnational law enforcement responses. It is evident that both the issuing and the executing states would bear the cost of the warrants. While the cost would be justified for the issuing state, it would be perceived, from the perspective of the executing state, as imposed upon it and obliging its taxpayers to pay for decisions that have been taken in the issuing state, therefore financing foreign criminal justice policies. The same effect could result from the differences in the criminal justice traditions of the Partner States. For example, unlike the opportunity principle in common law jurisdictions, the legality principle prevalent in French civil law traditions could facilitate an excessive issue of the warrants, which would cause disproportionate financial costs to their counterparts, a situation which may lead to contempt not only for the warrants but for the EAC too, in general, and its proposed criminal justice in particular.

Another aspect that would need consideration in the proposed transnational criminal justice, in terms of financial impact upon the Partner States, is the introduction of minimum rules concerning offences and sentences. On this, Estella Baker argues that there is a causal relationship between decisions about criminalization, punishment and the subsequent calls upon resources in national criminal justice budget to enforce them.<sup>1189</sup> In fact, there would be budgetary implications to the Partner States in the implementation of all other measures and legislative requirements proposed in this thesis in support of transnational criminal justice in the EAC, whether harmonization of substantive and procedural laws, and core procedural rights, or data protection mechanisms such as electronic databases of criminal records and information on persons wanted for arrest or extradition, witnesses or persons under surveillance.

An important question that would need to be addressed is the distribution of the costs, to

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<sup>1189</sup> *Ibid.*, p.105.

prevent asymmetrical pressure on the Partner States.<sup>1190</sup> Firstly, it would be necessary to ensure equity in the allocation, between richer and poorer countries, of input costs of the proposed criminal justice mechanisms, specifically the police and the criminal justice agency. Secondly, explicit provisions on costs should be included in relevant regulations that the EAC may need to take, especially those safeguarding rights in criminal proceedings, to establish the Partner States' responsibility in terms of costs incurred at all stages of criminal proceedings, for example in relation to interpretation and translation, legal advice and aid, or support to the most vulnerable suspects, accused or witnesses.

It would be essential to ensure the proposed mechanisms and measures are evidence – based<sup>1191</sup> in terms of sufficient information and research on their externalities, in order to establish their legitimacy and capability, and to balance against their cost. Evidence is also required to prove the effectiveness of the transnational criminal justice system. For example, the proposed mechanisms and measures' effectiveness in achieving their aim should be confirmed by scientific evidence,<sup>1192</sup> such as expert groups' opinions or commissioned external studies, before they could be adopted and imposed on the Partner States. Furthermore, it would be important to make sure the proposed police and the agency for criminal justice are acceptable to local populations. Given their supranational nature, there would be risks of lack of transparency and accountability to taxpayers,<sup>1193</sup> and dominance of the two institutions' agenda by the most powerful Partner States.<sup>1194</sup> This should be avoided by ensuring a democratic control over the actions of the institutions and by making them accountable to the communities they serve, including with respect to their budgetary expenditure.

## Conclusion

A model for cooperation in criminal matters in the EAC must allow efficient and effective provision of assistance among the Partner States both in the investigations of transnational crimes and the arrest as well as the extradition of persons suspected or accused of the crimes to

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<sup>1190</sup> See, Wilson, T.J. (2016). *Op.Cit.*, p.322.

<sup>1191</sup> Baker, E. (2016). *Op.Cit.*, p.104.

<sup>1192</sup> *Ibid.*

<sup>1193</sup> See, Wilson, T.J. (2016). *Op.Cit.*, p.322.

<sup>1194</sup> Turner, J.L. (2007). *Op.Cit.*, p.1020.



stand trial or to serve their sentences in the Partner States. The MR model, invented and currently applied in the EU, can provide the efficiency and effectiveness required, if adopted in the EAC. In particular, the simplification and expedition of procedures, and the reduction of grounds for refusal to grant a request for assistance reduce political and technical hindrances to the lowest. More importantly, the obligation to cooperate established in MR compels states to grant cooperation requests within an agreed framework. Like Article 4(3) TEU which lays down the legal obligation of the EU Member States to cooperate, Article 8(1) EAC Treaty provides a comparable basis for similar obligation in the EAC.

The framework for cooperation in criminal matters in the EAC will need creating legal and institutional mechanisms to accommodate MR and to enable national competent authorities to request assistance and to respond to requests made by other authorities across borders. The cooperation machinery will constitute a distinct criminal justice above the national criminal justices, and the expression of states' willingness to join efforts and collectively fight transnational crimes for their common interests. Such transnational criminal justice is justified by the expansion of transnational crimes across the region as a result of the region's economic policies, particularly the Common Market's freedom of movement.

There are no agreed principles of transnational criminal justice; different regions worldwide have established their own criminal justices to suit their particular needs. The EU criminal justice, discussed in this chapter as a model for the EAC, consists of a patchwork of measures and instruments designed to be enforced at national level. All investigations, prosecutions, adjudications and trials in the transnational criminal justice are domestic.

The differences in the national procedural and substantive laws as well as evidentiary rules pose a great challenge in the transnational criminal justice modelled on MR. In order to remedy the disparities in the national laws and the lack of a unified body of transnational law, the transnational criminal justice applies harmonisation of the laws and the adoption of minimum rules concerning offences and sentences. Similarly, it regulates key fundamental rights areas considered essential in transnational proceedings as a distinct sphere, to remedy the limitations of traditional human rights instruments to national proceedings.

Human rights protection is a prerequisite for cooperation in criminal matters. The MR model is premised on mutual trust and the assumption that national legal systems provide an equivalent protection of rights and should therefore trust each other. This has been proved wrong in the EU, despite the Member States' signature of the ECHR and the vast case law of the ECtHR. The state of human rights in the EAC is more complicate and mutual trust far from being achieved as none of the EAC Partner States, except Tanzania, recognizes the competence of the ACtHPR though all are signatories of the ACHPR. MR cooperation system in the EAC will require guarantees and safeguards against abuses before it could be adopted.

## CONCLUSION

The main purpose of this thesis is to propose mechanisms for cooperation in criminal matters in the EAC. The idea was born of a concern, as an EAC citizen, over local media frequent reports and increasing public discourse on transnational crimes in the EAC Partner States.

The materials that were discussed in the theoretical chapter are related to the new regionalism, as opposed to the old regionalism that was essentially based on trade and security. The wider scope of the new regionalism is the factor that determined the selection of regionalism as a theory that informs this thesis. It allowed engaging with other fields than economy and security, specifically transnational crime in the EAC. Although most of the materials discussed in the theoretical chapter was written in the context of the EU, the chapter considered a few other materials on regional organisations in other parts of the world too, specifically Latin America, Asia and Africa, for a more balanced account of the regionalism phenomenon and to avoid the criticism about a certain Eurocentric approach to regionalism in some studies on regional organisations. The flagrant absence, in the theoretical chapter, of materials on the EAC is due mainly to the dearth of academic literature on the EAC, particularly in the legal field except in respect of human rights. Furthermore, many materials on the EAC that I came across either lack a clear theoretical framework or they are based on different theories.

The thesis analyses transnational crime in the EAC in order to establish the need for the Community to cooperate in criminal matters regionally. The thesis focuses on transnational crime because of its complexity as crimes which planning, execution and impact transcend the borders of more than one country.<sup>1195</sup> As transnational crime is committed in the territories of several countries, by several accomplices of different citizenships or residing in different countries, each state affected may claim jurisdiction over the case.<sup>1196</sup> Moreover, the investigation and

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<sup>1195</sup> Coffey, G. (2013). "Resolving Conflicts of Jurisdiction in Criminal Proceedings: Interpreting *Ne Bis in Idem* in Conjunction with the Principle of Complementarity". *New Journal of European Criminal Law* 4(1-2), p.61-62.

<sup>1196</sup> Ruggeri, S. (2014). "Transnational Investigations and Prosecution of cross-Border Cases in Europe: Guidelines for a Model of Fair Multicultural Criminal Justice". In: Ruggeri, S. (Ed.). *Transnational Evidence and Multicultural Inquiries in Europe*. Springer. London, p.219.

prosecution of such crime require assistance of the states affected to accede to evidence that is lying in their territories, to seize proceeds of crime or to arrest and extradite suspects.

The thesis establishes, from various reports from the UNODC, independent organisations and the EAC, that transnational crime in the EAC is on rise and is expanding, and that the region is now an active transit, source and destination for illicit goods. The amount of illicit goods seized, the variety of transnational crimes identified, their frequency and the networks intercepted are evidence that the threat of transnational crime in the region is non-negligible. It is arguable whether the expansion and proportions of transnational crimes in the region are enough to justify establishing cooperation mechanisms as proposed in this research. However, transnational crime is used in this research as a starting point for arguing for cooperation in criminal matter in the EAC, as the phenomenon is little known, poses great challenges compared to national crimes, and its gravity and expansion raise global concern. This thesis does not preclude the extension of cooperation in criminal matters in the EAC to all other serious crimes and international crimes. It would be unacceptable that suspects of any serious crime take advantage of the free movement in the EAC to frustrate justice. While the interviews conducted for this thesis point out that transnational crime is damaging the economies of the Partner States and is undermining the regional integration efforts, the present thesis could not investigate the social and economic impact of transnational crime in the EAC, which it recommends for future research.

The thesis recommends MR as an effective model of cooperation in criminal matters, for the obligation to cooperate that it imposes. The proposal for the model was supported by the respondents to the interviews who recommended, in addition, that the competent authorities in the Partner States are given a margin of appreciation on the appropriateness of a request for assistance. This thesis could not agree more with the respondents' opinion since even in the EU, MR does not mean a blind execution of requests. It is applied on the basis of mutual trust and the assumption that the legal systems of the Member States provide equal protection of human rights.<sup>1197</sup> The assumption is based on the fact that all Member States are signatories of the

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<sup>1197</sup> Mancano, L. (2016). "The Right to Liberty in European Union Law and Mutual Recognition in Criminal Matters". *Cambridge Yearbook of European Legal Studies* 18, p.215.

ECHR<sup>1198</sup> although it has been proved wrong to the extent that some scholars advanced that the application of MR to the field of criminal justice turns it from liberal to authoritarian effects and enables the most punitive criminal systems to be executed in Europe.<sup>1199</sup> This is particularly relevant in the EAC considering death penalty is still applicable in the criminal justice systems of some Partner States, specifically Kenya,<sup>1200</sup> South Sudan and Uganda.

The respondents to the interviews for this thesis identified death penalty as a challenge to cooperation in criminal matters. Death penalty is irreconcilable with MR and the abolition of traditional principles of cooperation in criminal matters, such as the nationality exception in extradition matters. No single state would extradite its citizens to another state where they risk death penalty. There are ways states manage death penalty in cooperation in criminal matters. Particularly, states apply conditional extradition or the guarantee that, if extradited, a person will not be subjected to death penalty.<sup>1201</sup> Many criminal justice systems have inserted such provision in their laws.<sup>1202</sup> A conditional extradition could provide a solution to the tensions between death penalty and cooperation in criminal matters in the EAC.

Despite the obligation to execute it implies, MR allows provisions for grounds for refusal which may include absolute grounds for refusal and optional grounds for refusal, like in the EAW. It also provides for grounds for non-recognition or non-execution of requests, the possibility for a proportionality test, and the option for the executing state, in assistance in evidence, to substitute a requested measure in certain circumstances. It is safe to say that all the measures above alleviate, to some extent, the negative effects of MR. Nevertheless, MR has been praised

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<sup>1198</sup> Heard, C. and D. Mansell (2011). "The European Arrest Warrant: The Role of Judges When Human Rights are at Risk". *New Journal of European Criminal Law* 2(2), p.135.

<sup>1199</sup> Schünemann, B. (2014). "Solution Models and Principles Governing the Transnational Evidence Gathering in the EU". In: Ruggeri, S. (Ed.). *Transnational Evidence and Multicultural Inquiries in Europe*. Springer. London, p.169.

<sup>1200</sup> Although the Supreme Court of Kenya, in a landmark judgment on 14 December 2017, declared death penalty unconstitutional. See <https://www.deathpenaltyproject.org/2017/12/14/kenyan-supreme-court-declares-mandatory-death-penalty-unconstitutional/>, accessed on 1 November 2018.

<sup>1201</sup> Vandebroek, E. and F. Verbruggen (2013). "The EU and the death penalty abolition: The limited prospects of judicial cooperation in criminal matters as an external policy tool". *New Journal of European Criminal Law* 4(4), p. 485.

<sup>1202</sup> *Ibid.* Conditional extradition is particularly referred to in the UN Model Treaty on Extradition (Article 4(d)).

too, by other scholars, as enabling effective cooperation in criminal matters<sup>1203</sup> and expediting it significantly, particularly in extradition matters.<sup>1204</sup>

Effective cooperation in the EAC can also be achieved if requests (or warrants) are sent directly between national competent authorities in the criminal justice systems. This is another feature of the MR model which, essentially, aims at removing political, administrative and practical barriers to cooperation in criminal matters. Such direct cooperation requires excluding the executive power from involving in the execution of requests and concentrating cooperation in criminal matters in the criminal justice systems, strictly speaking.

The MR model abolishes traditional principles that govern international cooperation in criminal matters, such as the nationality exception (or non-extradition of nationals), the political offence exception, or the specialty rule. These principles were established to strengthen the sovereignty of nation states and their power on citizens considered as the subjects of the states.<sup>1205</sup> The principles were meant to protect the citizens against foreign powers; they represent a lack of trust in foreign legal systems.<sup>1206</sup> The respondents to the interviews for this thesis expressed support for the political offence exception, particularly, and the nationality exception to some extent. However, the thesis suggests that the structural changes and new governance models brought by regionalism in the EAC, the construction of a polity with symbols such as a flag and an anthem which the citizens increasingly identify themselves with, and the making of the East African citizenship with a passport render the principles above irrelevant.

The thesis analyses legal mechanisms established in the EU's cooperation system, in respect of extradition and assistance in evidence. It anticipates possible conflicts between the abolition of the nationality exception with the Constitutions of the EAC Partner States as was the case with

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<sup>1203</sup> Allegrezze, S. (2014). "Collecting Criminal Evidence Across the European Union: The European Investigation order Between Flexibility and Proportionality". In: Ruggeri, S. (Ed.). *Transnational Evidence and Multicultural Inquiries in Europe*. Springer. London, p.55.

<sup>1204</sup> Bonasera, J. (2017). "Brexit and the European Arrest Warrant: The United Kingdom's Chance to Curtail abuse of the Surrender System". *Arizona Journal of International and Comparative Law* 34(3), p.650-651.

<sup>1205</sup> Pirlac, A. (2011). "General Framework for the Implementation Decision no.2002/584/JAI on the European Arrest Warrant". *The Annals of The "Stefan cel Mare" University of Suceava* 1(13), p.350.

<sup>1206</sup> *Ibid.*

the EAW in some EU Member States. The thesis suggests that the Partner States may have to amend their Constitutions to accommodate the change that such abolition may introduce.

The thesis considers the broad scope of the EAW and the EIO as a risk factor for their disproportionate use for petty offences. It suggests limiting the application of the mechanisms to transnational crimes and other serious crimes as the Partner States may define. It also suggests limiting the issue and execution of the mechanisms to the judiciary, strictly speaking, and providing for a proportionality test to avoid their misuse and to safeguard individual rights.

The thesis recommends the establishment, in the EAC, of East African police and an East African agency for criminal justice, similar to the Europol and Eurojust in the EU, for supporting investigations and prosecution of transnational crime and for coordinating cooperation requests. The proposal for the two institutions considers the need for an integrated criminal justice system in the EAC to respond effectively to the expansion of crimes in the region, as the result of the policies of the Community, particularly the freedom of movement, and the mobility of criminal networks. If the latter can easily move across the borders of the EAC Partner States, so should police and investigators too be able to operate in networks across the borders. This argument reflects the view that we now live in an age of transnationalism<sup>1207</sup> as a consequence of new modes of governance, particularly regionalism, encouraged by globalization and increased interdependence between states. Accordingly, law too, including criminal law, is increasingly becoming transnational, in response to transnational phenomena such as crime.<sup>1208</sup>

The thesis views the creation of networks among authorities in the national criminal justice systems as essential for enabling dialogues on the practice and the law regarding transnational crime and other criminal issues of shared concern. However, the thesis argues that the creation of such networks must not compromise equality of arms with the defence and affect its structural position in transnational criminal proceedings as a particular form of justice above the states' level. The realization of a transnational criminal justice, the adoption of the mechanism proposed in this thesis, and indeed the establishment of cooperation in criminal matters will be achieved

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<sup>1207</sup> Shaffer, G. (2012). "Transnational Legal Process and State Change" *Law & Social Inquiry* 37, p.229.

<sup>1208</sup> See Turner, J. L. (2007). *Op.Cit.*, p.985.

only if the national criminal justice systems of the EAC Partner States provide equal and effective protection of fundamental and procedural rights but also if common standards for human rights are adopted at the regional level, in recognition that transnational criminal justice is different from national criminal justice systems and it puts individual rights at greater risk of infringement. At the moment, the EAC is far from reaching these goals. Except Tanzania, four Partner States who have ratified the ACHPR do not recognise the competence of the ACtHPR to receive cases from individuals and NGOs. Rwanda withdrew its declaration accepting the competence of the ACtHPR in February 2016, setting a bad precedence for the relevance of human rights in the Community.

The respondents to the interviews for the thesis suggest that there is a common agreement in the EAC to cooperate in criminal matters, despite sovereignty challenge inherent to international cooperation, especially in criminal matters. The report on transnational crime commissioned by the EAC in 2015 is a positive sign of the Community's concern about the crimes but it needs to translate into a meaningful action.

The EAC Treaty provides an opportunity for cooperation in criminal matters. It defines cooperation in legal and judicial matters as one of the objectives of the Community (Article 5). It also specifically refers to cooperation in cross-border crimes and the provision of MLA although in terms of what is essentially bilateral arrangements between the Partner States (Article 124(5)). More opportunities are found in the provision of principles and theories similar to those used in the cooperation model proposed in this thesis, paving the way for their easy transfer to the field of criminal law. Examples include harmonization of the social and economic policies of the Partner States (Article 4(3) EAC Common Market Protocol), mutual recognition of academic and professional qualifications (Article 11 EAC Common Market Protocol), and mutual trust as a fundamental principle of the Community (Article 6 EAC Treaty).

The time has come that the EAC addresses transnational crime. Cooperation in criminal matters must be taken seriously. It is as much important as trade and economy.



## BIBLIOGRAPHY

### ARTICLES

1. Abbott, K. W. (2005). "Towards a Richer Institutionalism for International Law and Policy." *Journal of International Law & International Relations* 1(1-2), pp.95-123.
2. Acharya, A. (2012). "Comparative Regionalism: A Field Whose Time has Come". *The International Spectator*. 47(1), pp.3-15.
3. Aderbach, J. and B.A. Rockman (2002). Conducting and Coding Elite Interviews. *PS* 35(4),
4. Alain M. (2001). "Transnational police cooperation in Europe and in North America: Revisiting the Traditional Border Between Internal and external Security Matters, or How Policing is being Globalized". *European Journal of crime, Criminal Law and Criminal Justice* 9(2), pp.113-129.
5. Albanese J. (2012). "Deciphering the linkagesd between organised crime and transnational crime". *Journal of International Affairs* 66(1), pp.1-16.
6. Albanese, J. S. (2004). North American Organised Crime. *Global Crime* 6(1),
7. Alegre, S. and M. Leaf (2004). "Mutual Recognition in the European Judicial cooperation: A Step Too Far Too Soon? Case Study- the European Arrest Warrant". *European Law Journal* 10(2), pp. 200–217.
8. Ambos, K. and S. Bock (2017). "Brexit and the European criminal justice system- An introduction". *Criminal Law Reform* 28,
9. Ansuateguiroig, F.J. (2016). "Human rights and judicial dialogue between America and Europe: Towards a new model of law?". *The Age of Human Rights* 6, pp.24-41.
10. Ayodeji Gafar, I. (2019). "Grand Corruption in Sub – Saharan Africa and the Feasibility of Establishing International Anti – Corruption Court". *AUDA* 11(1), pp.5-24.
11. Bachmaier Winter, L. (2013). "Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR's Case Law". *Utrecht Law Review* 9(4), pp.127-146.

12. Bachmann, V. and J.D. Sidaway (2010), "African regional integration and European involvement: external agents in the East African Community". *South African Geographical Journal*, 92(1), pp.1-6.
13. Baker, E. (2016). "What price criminal justice in the EU". *European Journal of Crime, Criminal Law and Criminal Justice* 24(2-3), pp.95-106.
14. Barkin, S. J. (2003). "Realist Constructivism". *International Studies Review* 5(3), pp. 325-342.
15. Basnett, Y. (2013). "Labour Mobility in East Africa: An Analysis of the East African Community's Common Market and the Free Movement of Workers". *Development Policy Review* 31(2), pp.131-148.
16. Beeson, M. (2005). "Rethinking regionalism: Europe and East Asia in comparative historical perspective". *Journal of European Public Policy* 12(6), pp. 969-985.
17. Bell, S. (2011). "Do we really need a New 'Constructivist Institutionalism' to Explain Institutional Change?". *British Journal of Political Science* 41(4), pp.883-906.
18. Bertrán de Felipe, M. and A. Nieto Martín (2012). "Post 9/11 Trends in International Judicial Cooperation". *Journal of International Criminal justice* 10, pp. 581-604.
19. Bickerton, C.J., D. Hodson and U. Puetter (2015). The New Intergovernmentalism: European Integration in the Post – Maastricht Era. *JCMS* 53(4), p.707. Also see, Schimmelfeninig, F. (2015), What's New in 'New Intergovernmentalism'? A Critique of Bickerton, Hodson and Puetter. *JCMS* 53(4), pp.703-722.
20. Birzu, B. (2016). "Cooperation Agreement between the European Central bank and Europol for Combating Euro Counterfeiting. Some Critical Opinions". *Acta Universitatis Danubius (AUDJ)* 12(2), pp.984-993.
21. Bizimana S. (2017). "The Burundi Legal System and Research". <http://www.nyulawglobal.org/globalex/Burundi1.html>, accessed on 20 May 2017.
22. Blackstock, J. (2010). "The European Investigation Order". *New Journal of European Criminal Law* 1(1), pp.481-498.
23. Blackstock, J. (2010). "The European Arrest Warrant Briefing and Suggested Amendments." *New Journal of European Criminal Law* 1(1), pp.16-30.

24. Blakesley, C., L. (1981). "The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History". *Boston College International and Comparative Law Review* IV (1), pp. 39-60.
25. Bobic, M. (2014). "Transnational Organised Crime and Terrorism: Nexus needing a human security framework". *Global crime* 15(3-4), pp.241-258.
26. Bogojević, S. (2017). "Judicial Dialogue Unpacked: Twenty Years of Preliminary References on Environmental Matters Initiated by the Swedish Judiciary". *Journal of Environmental Law* 29, pp.263-283.
27. Bonasera, J. (2017). "Brexit and the European Arrest Warrant: The United Kingdom's Chance to Curtail abuse of the Surrender System". *Arizona Journal of International and Comparative Law* 34(3), pp.637-658.
28. Boucher, A. (2017). Power in elite interviewing: Lessons from feminist studies for political science. *Women's studies International Forum* 62, pp.99-106.
29. Brennan, A.J. and J.K. Kalsi (2015). "Elephants poaching & ivory trafficking problems in Sub-Saharan Africa: An application of O'Hara's principles of political economy". *Ecological Economics* 120, pp.312-337.
30. Burchard, C. and D. Brodowski (2010). Post-Lisbon principle of transnational ne bis in idem: On the relationship between article 50 charter of fundamental rights and article 54 convention implementing the schengen agreement: Case note on district court aachen, germany, (52 ks 9/08 boere), decision of december 2010. *New Journal of European Criminal Law*, 1(3), 310-327.
31. Bures, O. (2010). "Eurojust's Fledgling Counterterrorism Role". *Journal of Contemporary European Research* 6(2), pp.236-256.
32. Busuioc, M. (2013). "Beyond Design: The Evolution of Europol and Eurojust". *Perspectives on European Politics and Society* 14(3), pp.285-304.
33. Busuioc, M., Curtin, D. and M. Groenleer (2011). "Agency growth between autonomy and accountability: the European Police Office as a 'living institution". *Journal of European Public Policy* 18(6), pp.848-867.

34. Caeiro, P., Fidalgo, S. and J. Prata Rodrigues (2018). "The evolving notion of mutual recognition in the CJEU's case law on detention". *Maastricht Journal of European and Comparative Law* 25(6), pp.689-703.
35. Cafarelli, A. (2010). Extradition law- Criminal defendants extradited outside of treaties lack standing to assert rule of specialty- United States v. Valencia-Trujillo, 573 f.3d 1171 (11th cir. 2009). *Suffolk Transnational Law Review* 33(2), pp.377-390.
36. Campos-Pardillos, M- Á. (2017). "Liaison magistrates" and "contact points" as a "remedy" against "high levels of mistrust": Metaphorical imagery in scholarly papers on EU judicial cooperation". *Ibérica* 34, pp. 231-256.
37. Cantrell, C., L. (Spring 1977). "The Political Offence Exemption in International Extradition: A Comparison of the United State, Great Britain and the Republic of Ireland". *Marquette Law Review* 777 60(3), pp. 777-824.
38. Castel, J.G. and M. Edwards (1975). "Political offences: Extradition and deportation- Recent Canadian developments". *Osgoode Hall Law Journal* 13(1), pp.89-148.
39. Christiansen, T. Jorgensen, K. E. and al. (1999). "The social construction of Europe". *Journal of European Public Policy* 6(4), pp. 528–544.
40. Cirera, X. (2013). Regional Integration in EAC Countries: Lessons and the Way Forward. TradeMark East Africa, 26p.
41. Coffey, G. (2013). "Resolving Conflicts of Jurisdiction in Criminal Proceedings: Interpreting Ne Bis in Idem in Conjunction with the Principle of Complementarity". *New Journal of European Criminal Law* 4(1-2), pp.59-79.
42. Coninsx, M. and L.L. Da Mota (2009). "The International Role of Eurojust in Fighting Organised Crime and terrorism". *European Foreign Affairs Review* 14, pp.165-169.
43. Cotterrell, R. (2012). "What Is Transnational Law". *Law & Social Inquiry* 37, p.500-524.
44. Currie, R.J. (2000). "Human rights and international mutual legal assistance: Resolving the tension". *Criminal Law Forum* 11, pp. 143–181.
45. Dandurand, Y. Colombo, G. and N. Passas (2007). "Measures and mechanisms to strengthen international cooperation among prosecution services". *Crime Law and Social Change* 47, pp.261-289.

46. De Moor, A. and G. Vermeulen (2010). "The Europol Council decision: transforming Europol into an agency of the European union". *Common Market Law Review* 47, pp.1089-1121.
47. Durevall, D. (2011). "East African Community: Pre-conditions for an Effective Monetary Union". Working Papers in Economics. School of Business, Economics and Law. University of Gothenburg, 39p.
48. Dusabe, F. (2016). "Rwanda: Assessing the effectiveness of legal and policy responses to fight Money Laundering". *Journal of Money Laundering Control* 19(1), pp.21-31.
49. Ebobrah, S.T. (2009). "Human Rights developments in sub-regional courts in Africa during 2008". *African Human Rights Law Journal* 9, pp.312-335.
50. Elliot, L. (2012). "Fighting transnational environmental crime". *Journal of International Affairs* 66(1), pp. 87-104.
51. Erne, J. (2010). Primary and secondary law-making in the renewed EU. *Trames* 14(64/59), pp. 250-270
52. Farooq, A. (2001). "International Cooperation to combat organized crime". UNAFEI, Resource material series n° 57, pp. 166-176.
53. Fawcett, L. (2004). "Exploring regional domains: A comparative history of regionalism". *International Affairs* 80(3), pp.429-446.
54. Fawcett, L. (2013). "The history and Concept of Regionalism". United Nations University. Comparative Regional Integration Studies. Working Papers, 18p.
55. Fawn, R. (2009). "'Regions' and Their Study: Wherefrom, What for and Whereto?". *Review of International Studies*. 35, pp.5-34.
56. Forstein, C. (2015). Challenging Extradition: The Doctrine of Specialty in Customary International Law. *Columbia Journal of Transnational Law* 53(2), pp.363-395.
57. Frishman, O. (2013). "Transnational Judicial Dialogue as an Organisational Field". *European Law Journal* 19(6), pp.739-758.
58. Garner, J. M. (1922). Book review. *Introduction à l'Etude du droit Pénal International*, by Donnedieu de Vabres, H. *The American Journal of International Law* 16(3), pp.493-494.

59. Gasamagera, W. (2007). "The Constitution making process in Rwanda: Lessons to be learned". 7th Global Forum for Reinventing Government. Vienna, 9p.
60. Gaspar-Szilogyi, S. (2016). "Joined Cases Aranyosi and Căldăraru: Converging human rights standards, mutual trust and a new ground for postponing a European Arrest Warrant". *European Journal of Crime, Criminal Law and Criminal Justice* 24(2-3), pp.197-220.
61. Gastorn, K. (2015). "The Inevitable Reforms of the Legislative Competencies of the East African Legislative Assembly". *Verfassung Und Recht in Ubersee VRU* 48, pp. 28–48.
62. Geyer, F. (2008). "European Arrest Warrant. Court of Justice of the European Communities. Judgment of 3 May 2007, Case C-303/05, Advocaten voor de Wereld VZW v. Leden van de Ministerraad". *European Constitutional Law Review* 4, pp.149-161.
63. Gless S. (2013). "Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approaches to General Principles". *Utrecht Law Review* 9(4), pp.90-108.
64. Gless, S. and J.A.E. Vervael (2013). "Law Should Govern: Aspiring General Principles for Transnational Criminal Justice". *Utrecht Law Review* 9(4), pp.1-10.
65. Gomez-Jara Diez, C. and E. Herlin-Karnell (2018). "Prosecuting EU financial crimes: The European Public Prosecutor's Office in comparison to the US federal regime". *German Law Journal* 19(5), pp.1191-1220.
66. Goodrich, L. M. (1949). "Regionalism and the United Nations". *The United States and the Atlantic Community* 23(3), pp.47-56.
67. Gossin. P. (2008). "International Mutual Legal Assistance in Switzerland". UNAFEI, Resource material series n° 77, pp. 19-22.
68. Gossmann, A. (2009). "Tusks and trinkets: An overview of illicit ivory trafficking in Africa". *African Security Review* 18(4), pp.50-69.
69. Goto, J. (2012). "Regional Integration in East Africa Diversity or Economic Conformity". JICA Research Institute Working Paper 46, 26p.
70. Green, R. H. (1978). "The East African Community: A Valediction forbidding Mourning". *The African Review* 8(1), pp.1-27.

71. Griffith, G. and C. Harris (2005). Recent Developments in the Law of Extradition. *Melbourne Journal of International Law* 6(1).
72. Grigorescu, A. and C. Baser (2019). The choice between intergovernmentalism and nongovernmentalism. Projecting Domestic Preferences to Global Governance. *World Politics* 71(1), pp.88-125.
73. Haastrup, T. (2013). "Eu as Mentor? Promoting Regionalism as External relations Practices in EU – Africa Relations". *European Integration* 35(7), pp.785-800.
74. Haggemüller, S., (2013). "The Principle of Proportionality and the European Arrest Warrant". *Oñati Socio-legal Series* [online], 3(1), pp.95-104.
75. Hall, A and C.R. Rosemary Taylor. (1996). "Political Science and the Three New Institutionalisms". Public lecture. Max – Planck Institut Fur Gesellschaftsforschung MPIFG, Discussion Paper 96/6, 36p, at [https://www.mpifg.de/pu/mpifg\\_dp/dp96-6.pdf](https://www.mpifg.de/pu/mpifg_dp/dp96-6.pdf), accessed on 15 May 2017.
76. Hamran, L and E. Szabova (2013). "European Public Prosecutor's Office – Cui Bono? New *Journal of European Criminal law* 4(1-2), pp.40-58.
77. Hans-Georg, P. (2010). "Tax Systems and Tax Harmonisation in the East African Community". Report for the GTZ and the General Secretariat of the EAC, 128p.
78. Harfield, C. (2003). "A Review Essay on Models of Mutual Legal Assistance: Political Perspectives on International Law Enforcement Cooperation Treaties". *International Journal of Comparative and Applied Criminal Justice* 27(2), pp.221-241.
79. Harfield, C. (2011). "Transnational Criminal Investigation and Modes of Governance". *Policing* 5(1), pp.3-14.
80. Hay, C. and D. Wincott (1998). "Structure, Agency and Historical Institutionalism". *Political Studies* XLVI, pp.951–957.
81. Heard, C. and D. Mansell (2011). "The European Arrest Warrant: The Role of Judges When Human Rights are at Risk". *New Journal of European Criminal Law* 2(2), pp.133-147.
82. Heine, J. (2012). "Regional integration and political cooperation in Latin America". *Latin America Research Review* 47(3), pp.209-217.

83. Herrigel, H. (2005). "Institutionalists and the limits of institutionalism: a constructivist critique of two edited volumes from Wolfgang Streeck and Kozo Yamamura". *Socio – Economic Review* 3(3), pp. 559–567.
84. Hettne, B. and F. Söderbaum (2000). "Theorising the rise of Regionness". *New Political Economy* 5(3), pp.457-472.
85. Hills, A. (2009). "The possibility of transnational policing". *Policing and Society* 19(3), pp.300-317.
86. Holmes, P. and J. Rollo. (2012). "EAC Integration: Some lessons from the EU Experience". *Trade Mark East Africa*, 21p.
87. Hübschle, A. (2011). "From Theory to Practice: Exploring the Organised Crime-Terror Nexus in Sub-Saharan Africa". *Perspectives on Terrorism* 5(3-4), pp.81-95.
88. Hurrell, A. (1995). "Explaining the resurgence of regionalism in world politics". *Review of International Studies* 21(04), pp.331-358.
89. Hurrell, A. (2007). "One world? Many worlds? The place of regions in the study of international society". *International Affairs* 83(1), pp.127-146.
90. .
91. Jetschke, A. and T. Lenz (2013). "Does regionalism diffuse? A new research agenda for the study of regional organisation". *Journal of European Public Policy* 20(4), pp.626-637.
92. Jordaan, A. (2014). "Regional integration in Africa versus higher levels of intra – Africa trade". *Development Southern Africa* 31(3), pp.515-534.
93. Joutsen, M. (2006). "The European Union and Cooperation in criminal Matters; the search for Balance". HEUNI Paper 25, 43p.
94. Kamala B., D. (2006). "The Achievements and Challenges of the New East African Community Cooperation". Open lecture. Business School. University of Hull, 21p.
95. Kaunert, C. (2010). "Europol and EU Counterterrorism: International Security Actorhood in the External Dimension". *Studies in Conflict & Terrorism* 33(7), pp.652-671.
96. Kielsgard, M., D. (2013). "The Political Offence Exception: Punishing Whistleblowers Abroad". *The European Journal of International law*, at <https://www.ejiltalk.org/the->



[political-offense-exception-punishing-whistleblowers-abroad/](#), accessed on 20 May 2014.

97. Kigabo R.T. and P.R. Masson (2013). "Design and Implementation of a Common Currency Area in the East African community". *African journal of Business Management* 7(35), pp.3575-3590.
98. Kirby, M. (2008). "Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges". *Melbourne Journal of International Law* 9, pp.171-189.
99. Kitipov, J. (2012). "African integration and inter – regionalism: The regional economic communities and their relationship with the European Union". *Strategic Review for Southern Africa* 34(1), pp.21-44.
100. Kofi Darbi, W.P. and C.M., Hall (2014). Elite interviews: critical practice and tourism. *Current Issues in Tourism* 17(9), pp.832-848.
101. Kohler, M. (2014). European Governance and the European Parliament: From Talking Shop to Legislative Powerhouse. *JCMS* 52(3), pp.600-615.
102. Koroma, S. Mosoti, V. et. al. (2008) "Towards an African common market for agricultural products". *FAO Review of Agricultural Commodity Policies* 2, 219p.
103. Kurian, A.L. and C. Vinodan (2013). "Regionalism and Regional Cooperation in International Relations: A conceptual Analysis". *Online International Interdisciplinary Research Journal* III(VI), pp. 396 - 411.
104. Lagony, O. and W. Schomburg (1994). "International Cooperation in Criminal Matters and the Rights of the Individual from a Germany Perspective". *European Journal of Crime, Criminal Law and Criminal Justice* (4), pp.379-405.
105. Law, D.S. and W-C. Chang (2011). "The limits of global judicial dialogue". *Washington Law Review* 86, pp.523-577.
106. Leal-Arcas, R. (2007). Theories of Supranationalism in the EU. *The Journal of Law in Society* 8(1), pp.88-113.
107. Leroy, H. (March 1953). "International judicial assistance: Procedural chaos and a program for reform". *The Yale Law Journal* 62(4), pp. 515-562.

108. LeSage, A. (2014). "The Rising Terrorist Threat in Tanzania: Domestic Islamist Militancy and Regional Threats. *Strategic Forum* 288, pp.1-16.
109. Lilleker, D.G. (2003). Interviewing the Political Elite: Navigating a Potential Minefield. *Politics* 23(3), pp.207-224.
110. Luchtman, M. and J. Vervaele. (2014). "European Agencies for Criminal Justice and Shared Enforcement (Eurojust and the European Public Prosecutor's Office)". *Utrecht Law Review* 10(5), pp.132-150.
111. Mackarel, M. (2006). "Surrendering the Fugitive- The European Arrest Warrant and the United Kingdom". *The Journal of criminal Law* 71, pp.362-381.
112. Maguire, M. (2000). "Policing by risks and targets: Some dimensions and implications of intelligence-led crime control". *Policing and Society: An International Journal* 9(4), pp. 315-336.
113. Malecela, J.S. (1972). "What next for the East African Community? A case for Integration". *The African Review* 2(1), pp.211-217.
114. Mancano, L. (2016). "The Right to Liberty in European Union Law and Mutual Recognition in Criminal Matters". *Cambridge Yearbook of European Legal Studies* 18, pp.215-238.
115. Mancano, L. (2018). "Mutual recognition in criminal matters, deprivation of liberty and the principle of proportionality. *Maastricht Journal of European and Comparative Law* 25(6), pp.718-732.
116. Mangiaracina, L. (2013). "A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order". *Utrecht Law Review* 10 (1), pp.113-133.
117. Mann, G.J. (2007). "The European Arrest Warrant: A Short-Lived Mechanism for Extradition". *Syracuse Journal of International Law and Commerce* 34, pp.715-740
118. Mann, M. Warren, I & S. Kennedy (2018) "The legal geographies of transnational cyber-prosecutions: extradition, human rights and forum shifting". *Global Crime* 19(2), pp.107-124.

119. Mansfield, E. and H.V. Milner (1999). "The New Wave of Regionalism". *International Organisation* 53(3), pp.589-627.
120. Mansfield, E. D. and E. Solingen (2010). "Regionalism". *Annual Review of Political Science* 13, pp.45-63.
121. Marin, L. (2014). "Effective and Legitimate- Learning from the Lessons of 10 Years of Practice with the European Arrest Warrant". *New Journal of European Criminal Law* 5(3), pp.327-348.
122. Marine, F.J. (1999). "The threats posed by transnational crimes and organised crime groups" UNAFEI Resource Material Series 54, Tokyo, pp.25-53.
123. Markert, M. (2014). "Tacit procedural politics: institutional change and member states' strategies in police and judicial cooperation in criminal matters". *Cambridge Review of International Affairs* 27(1), pp.106-126.
124. Matambalya, F.A.S.T. (2011). "Building the East African Common market: Opportunities, Concerns, and Options". CSAE Conference Discussion Paper ID-468, 29p.
125. Mathisen, G. (2010). "Nordic Cooperation and the European Arrest Warrant: Intra-Nordic Extradition, the Nordic Arrest Warrant and Beyond". *Nordic Journal of International Law* 79, pp.1-33.
126. Mattli, W. (1999). "Explaining regional integration outcomes". *Journal of European Public Policy* 6(1), pp.1-27.
127. Mattli, W. and A.S. Sweet (2012). "Regional Integration and the Evolution of the European Polity: On the Fiftieth Anniversary of the Journal of Common Market Studies". *JCMS* 50 (S1), pp.1-17.
128. Mbilinyi, S.M. (1973). "East African Export Commodities and the Enlarged European Economic Community". *The African Review: a journal of African politics development and international affairs* 3(1), pp.85-110.
129. Mbogoro, D.A.K. (1978). "The East African Community: An Economic Analysis of the integration scheme". *African Review* 8(1-2), pp.54-74.
130. McEvoy, J. (2006). Elite Interviewing in a Divided Society: Lessons from Northern Ireland. *Politics* 26(3), pp.184-191.

131. Mcgarrell, E. F. (2004). "Global and Local policing: Common Principles for the Future of Policing". *International Journal of Comparative and Applied criminal justice* 28(1), pp1-14.
132. McIntyre, M.A. (2005). "Trade Integration in the East African Community: An Assessment for Kenya". IMF Working Paper WP/05/143, 26p.
133. Mertenskoetter P. and S. Luak (2012). "An overview of the Legal System and Legal Research in the Republic of South Sudan" [http://www.nyulawglobal.org/globalex/South\\_Sudan.html](http://www.nyulawglobal.org/globalex/South_Sudan.html)
134. Michaels, R. (2009). "Recognition and Enforcement of Foreign Judgments". Encyclopedia of Public International Law, Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press, 13p.
135. Miles, W. (2015). "The East African Community: "Is the level of Business Cycle Synchronisation Sufficient?"". *Applied Economics and Finance* 2(4), pp.115-125.
136. Mngomezulu, B.R. (2013). "Why did regional integration fail in East Africa in the 1970s? A historical explanation". History and African Study seminar. 16p.
137. Monaco, F. R. (1995). "Europol: The Culmination of the European Union's International Police Cooperation Efforts". *Fordham international law journal* 19, pp.247-307.
138. Monar, J. (2013). "Eurojust's present and future role at the frontline of European Union criminal justice cooperation". *ERA Forum* 14, pp.187-200.
139. Moon, S. D. (2013). "'Tissue on the Bones': Towards the Development of a Post – structuralist Institutionalism". *Politics* 33(2), pp.112-123.
140. Moore, N. and P. Stokes (2012). Elite interviewing and the role of sector context: an organisational case from the football industry. *QMRIJ* 15(4), pp.438-464.
141. Morris, H.F. (1970). "Some perspectives of East African legal history". *Crime in East Africa* 3, 28p.
142. Munyua, D. (2012). "Combating Terrorism: A Ugandan Perspective". *Combative Terrorism Exchange CTX* 2(1), pp.213-236.

143. Musotso, C. (2010). "Harmonisation of EAC tax policies and laws". CUTS GRC Research Paper, 46p.
144. Mwaniki, M. (2010). "Language management and the East African Community". *Language Matters* 41(2), pp.260-277.
145. Nabudere D. W. (1978). "Tanzania and Regional Integration in East Africa. Old and New Patterns". *African Review* 8(1-2), pp.124-155.
146. Nieto, D. (2012). "Neoliberalism, Biopolitics and the Governance of Transnational Crime". *Colombia Internacional* 76, pp.137-165.
147. Nir, E. (2018). Approaching the bench; accessing elites on the judiciary for qualitative interviews. *International Journal of Social Research Methodology*, pp.77-89.
148. Nsibambi, A.R. (1972). "Political Commitment and Economic Integration: East Africa's experience". *Africa Review* 2(1), pp.189-210.
149. Nyanduga, B.T. and C. Manning (2016). "Guide to Tanzanian Legal System and Research". <http://www.nyulawglobal.org/globalex/Tanzania1.html>
150. Oba, I.B. (2015). "Evolution of Kadhi's Courts in Zanzibar". *Journal of Law, Policy and Globalisation* 37, 5p.
151. Obokata, T. (2011). "Key EU principles to combat transnational organised crime". *Common Market Law Review* 48, pp. 801-828.
152. Obokata, T. (2017). "The Value of International Law in Combating Transnational Organised Crime in the Asia-Pacific". *Asian Journal of International Law* 7, pp.39-60.
153. Obydenkova, N. (2011). "Comparative regionalism: Eurasian Cooperation and European integration. The case for neofunctionalism". *Journal of Eurasian Studies* 2, pp.87-102.
154. Ogonnaya U.M. and K. Ogujiuba (2015). "Regional Parliamentary Assemblies in Africa: Challenges of Legitimacy of Authority and Status of Operation. *The Journal of Legislative Studies* 21(4), pp. 553-573.
155. Ojienda T. and L.O. Aloo (2011). "Researching Kenyan Law", at [www.nyulawglobal.org/globalex/Kenya.html](http://www.nyulawglobal.org/globalex/Kenya.html), accessed on 20 May 2017.

156. Onyango, J.O. (2015). "Human Rights and Public Interest Litigation in east Africa: A bird's eye view". *The George Washington International Law Review* 47, pp.763-823.
157. Opertti, D. (May 1992). "Juridical Mutual Cooperation in Criminal Matters. The latest trends in the Inter – American System and the bilateral treaties between the United States and Latin American Countries". *Netherlands International Law Review* 39(1), pp.89-125.
158. Ostropolski, T. (2014). "The Principle of Proportionality under the European Arrest Warrant - with an Excursus on Poland". *New Journal of European Criminal Law* 5(2), pp.167-191.
159. Ouko, R.J. (1969). "The East African Community". *International Review of Administrative Sciences* 35(1), pp.47–51.
160. Paasi, A. (2011). "The region, identity, and power". *Procedia Social and Behavioural Sciences* 14, pp.9-16.
161. Padfield, N. (2007). The European Arrest Warrant: Between Trust, Democracy and the Rule of Law. The Implementation of the European Arrest Warrant in England and Wales. *European Constitutional Law Review* 3(2), pp.253-268.
162. Pankratz, T. and M. Hanns (2012). "Understanding Transnational Organised Crime. A constructivist approach towards a growing phenomenon". *SIAC-Journal for Police Science and Practice* 2, pp.41-50.
163. Parcalabu, D.D., Modiga, G. and G. Gurita (2011). "Importance and necessity of International Judicial Cooperation in Criminal Matters". The 6th Edition of the International Conference European Integration Realities and Perspectives. Legal Sciences, pp.171-178.
164. Patrone, I. (2013). "Conflicts of jurisdiction and judicial cooperation instruments: Eurojust's role". *ERA Forum* 14, pp.215-225.
165. Peers, S. (2002). "The European Union and substantive criminal law: Reinventing the wheel?". *Netherlands Yearbook of International Law* XXXIII, pp.45-73.
166. Petrescu, O.M. (2013). "The European judicial cooperation in criminal matters in the light of the Lisbon treaty". *Challenges of the Knowledge Society*, pp.1208-1226.

167. Piattoni, S. (2016). The European Union between Intergovernmentalism and 'Shared and Responsible Sovereignty': The Haptic Potential of EMU's Institutional Architecture (The Government and Opposition? Leonardo Schapiro Lecture, 2016). *Government and Opposition* 52(3), pp.385-411.
168. Pirlac, A. (2011). "General Framework for the Implementation Decision no.2002/584/JAI on the European Arrest Warrant". *The Annals of The "Stefan cel Mare" University of Suceava* 1(13), pp. 348-354.
169. Pirozzi, N. and A. Godsäter. (2015). "The EU and Africa: Regionalism and interregionalism beyond institutions". *Atlantic Future. Working paper* 26, 26p.
170. Plachta, M. (2003). "European Arrest Warrant: Revolution in Extradition". *European Journal of Crime, Criminal law and Criminal Justice* 11(2), pp.178-194.
171. Possi, A. (2015). "Striking a balance between community norms and human rights: The continuing struggle of the East African Court of Justice". *African Human Rights Law Journal* 15(1), pp. 192-213.
172. Powell, W.W. and P. Bromley. (2015). "New Institutionalism in the Analysis of Complex Organizations". In: Wright, J. D. (Ed). *International Encyclopedia of the Social & Behavioral Sciences*, 2nd edition 16. Oxford: Elsevier. pp.764–769.
173. Prost, K. (2007). "Breaking down the barriers: International cooperation in combating transnational crime". *Information Exchange Network for Mutual Assistance in Criminal Matters and Extradition*, at [http://www.oas.org/juridico/mla/en/can/en\\_can\\_prost.en.html](http://www.oas.org/juridico/mla/en/can/en_can_prost.en.html), accessed on 15 March 2014.
174. Rackow, P. and C. Birr (2010). "Recent developments in legal assistance in criminal matters". *Goettingen Journal of International Law* 2(3), pp. 1087-1128.
175. Rademayer, J. (2016). "Beyond the Borders: Crime, conservation and criminal networks in the illicit rhino horn trade". *The Global Initiative Against Transnational Organised Crime*. Geneva, 37p.
176. Raffaelli, R. (2017). "Judicial cooperation in criminal matters". *Fact sheets on the European Union*. [www.europarl.europa.eu/factsheets/en](http://www.europarl.europa.eu/factsheets/en)

177. Reith, S. and M. Boltz (2011). "The East African community. Regional integration between aspiration and reality". Konrad-Adenauer-Stiftung (KAS) Reports, pp.91-117.
178. Richards, D. (1996), Elite Interviewing: Approaches and Pitfalls. *Politics* 16(3)
179. Richards, A. (2014). "Conceptualising Terrorism". *Studies in Conflict & Terrorism* 37(3), pp.213-236.
180. Riedel, R. (2004). "Regionalism in the context of a political system". 1st Danube Rectors Conference. Summer School on Regional cooperation, pp.49-54.
181. Riggirozzi, P. (2010). "Region, regionness and regionalism in Latin America: Towards a new synthesis". Latin American Trade Network. Working Paper 130, 17p.
182. Riggirozzi, P. (2012). "Region, Regionness and Regionalism in Latin America: Towards a New Synthesis". *New Political Economy* 17(4), pp.421-443.
183. Rijken, C. (2010). "Re-balancing security and justice: Protection of fundamental rights in police and judicial cooperation in criminal matters". *Common Market Review* 47, pp.1455-1492.
184. Riyanto, S. (2017). The Emergence of Universalism and the Decline of Supranationalism. *Mimbar Hukum* 29(2), pp.308-320.
185. Roma Valdés, A. (2015). "The mutual recognition principle in criminal matters: a review". *ERA Forum* 16, pp.291-303.
186. Rosberg C. G. (1971). "National identity in African states." *African Review* 1(1), pp.79-92.
187. Ruggiero, V. (2000). "Transnational Crime: Official and Alternative Fears". *International Journal of the Sociology of Law* 28, pp.187-199.
188. Rukanova, B., R.T. Wigand, E. van Stijn and Y-H Tan (2015). Understanding transnational information systems with supranational governance: A multi – level conflict management perspective. *Government Information Quarterly*, pp.182-197.
189. Sapir, A. (1992). "Regional Integration in Europe". *The Economic Journal* 102(415), pp.1491-1506.
190. Satzger, H. (2019). "Is mutual recognition a viable general path for cooperation?". *New Journal of European Criminal Law* 10(1), pp.44-56.



191. Schallmoser, N. M. (2014), "The European Arrest Warrant and Fundamental Rights: Risks of Violation of Fundamental Rights through the EU Framework Decision in Light of the ECHR". *European Journal of Crime, Criminal Law & Criminal Justice* 22(2), pp.135-165.
192. Schmid, A. P. (2012). "The Revised Academic Consensus Definition of Terrorism". *Perspectives on Terrorism* 6(2), pp.158-159.
193. Schmidt, A. V. (2008). "Discursive Institutionalism: The explanatory Power of Ideas and Discourse". *Annual Review of Political Science* 11, pp.303-326.
194. Schmidt, A. V. (May 2008). "Bringing ideas and discourse back into the explanation of change in varieties of capitalism and welfare states". Centre for Global Political Economy. University of Sussex, 25p.
195. Schmitter, P.C. (2007). "Regional cooperation and regional integration." Essay. The European University Institute, 27p.
196. Schneider F and R. Caruso (2011). "The (Hidden) Financial Flows of Terrorist and Transnational Crime Organisations: A Literature Review and Some Preliminary Empirical Results." Economics Security Working Paper 52, 34p.
197. Schomburg, W. (2012). Criminal matters: transnational ne bis in idem in Europe- Conflicts of jurisdictions- transfer of proceedings. *ERA Forum* 13, pp.311-324.
198. Schreuer, C. (1995). "Regionalism v. Universalism". *European Journal of International Law* 6(1), pp.477-499.
199. Sebalu, P. (1972). "The East African Community". *Journal of African Law* 16(3), pp.345-363.
200. Serzysko, A. (2011). "Eurojust and the European Judicial Network on a new legal basis". *ERA Forum* 11, pp.585-600.
201. Shaffer, G. (2012). "Transnational Legal Process and State Change". *Law & Social Inquiry* 37, pp.229-264.
202. Sheptycki, J. (2002). "Accountability Across the policing Field: Towards a General Cartography of Accountability for post-Modern Policing". *Policing and Society* 12(4), pp.323-338.

203. Sheptycki, J. (2005). "Transnational Policing". The Canadian Review of Policing Research 1, at [www.crpr.icaap.org/index.php/article/view/31/48](http://www.crpr.icaap.org/index.php/article/view/31/48), accessed on 11 August 2018.
204. Sheptycki, J. W. E. (1995). "Transnational Policing and the makings of a Postmodern State". *British journal of criminology* 35(4), pp.613-635.
205. Shinyekwa, I.M.B. (2015). "Has the East African Community Regional Trade Agreement Created of Diverted Trade? A Gravity Model Analysis". *Journal of Sustainable Development* 8(9), pp.129-138.
206. Sieberson, S.C. (2010). Inching toward EU Supranationalism? Qualified Majority Voting and Unanimity under the Treaty of Lisbon. *Virginia Journal of International Law* 50(4), pp.919-996.
207. Simma, B. and A.L. Paulus. (1998). "The "International Community": Facing the Challenge of Globalisation". *European Journal of International Law* 9, pp.266-277.
208. Slaughter, A-M. Tulunello, A. S. and S. Wood (1998). "International Law and International relations Theory: A New Generation of Interdisciplinary Scholarship". *The American Journal of International Law* 92(3), pp.367-397.
209. Snaith, H. (2013). "Constructivist institutionalism, (multi – level) governance, and the Euro crisis". Paper presented to BISA annual conference (Draft), Birmingham, 21p.
210. Söderbaum, F. (2010). "With a Little Help From My Friends": How Regional Organisations in Africa Sustain Clientelism, Corruption and Discrimination". Swedish Political Science Association annual conference, 15p.
211. Souminen, A. (2008). "The Past, Present and the Future of Eurojust". *Maastricht Journal of European and Comparative Law* 15(2), pp.217-234.
212. Sperling, J. (2013) "EU police and judicial cooperation before the Treaty of Lisbon: Strengthening of the weakest link?". *European Security* 22(2), pp.202-229.
213. Spindler, M. (2002). "New Regionalism and the Construction of Global Order. Centre for the Study of Globalisation and Regionalisation". Working Paper No.93/02, 31p.
214. Springer, J. P. (2001). "Obtaining Foreign Assistance to Prosecute Money Laundering Cases: A US Perspective". *Journal of Financial Crime* 9(2), pp.153-164.

215. Staeger, U. (2015). "The European Union's Regionalism Diplomacy in Africa: An English School Approach". UNU-CRIS. Bruges Regional Integration and Global Governance Paper 2/2015, 33p.
216. Stahl, M. H. (2005). "Tariff Liberalisation Impacts of the Customs Union in Perspective". Tralac Working Paper 4/2005, [www.paulroos.co.za/wp-content/blogs.dir/12/files/2011/uploads/20050919\\_WP4\\_Stahl.pdf](http://www.paulroos.co.za/wp-content/blogs.dir/12/files/2011/uploads/20050919_WP4_Stahl.pdf)
217. Sterling – Folker, J. (2000). "Competing Paradigms or Birds of a Feather? Constructivism and Neoliberal Institutionalism Compared". *International Studies Quarterly* 44, pp.97-119.
218. Summers, M. A. (2010). "Rereading Rauscher: Is it time for the United States to abandon the rule of specialty?". *Duquesne Law Review* 48(1), pp.1-32.
219. Suominen, A. (2017). "Brexit and EU criminal law- The Norwegian approach". *Criminal Law Forum* 28(2), pp.251-273. Suominen, A. (2014). "Limits of Mutual Recognition in Cooperation in Criminal Matters within the EU - Especially in Light of Recent Judgments of Both European Courts." *European Criminal Law Review* 4(3), pp.210-235.
220. Sutherland, P. D. (1984). "The development of international law of extradition". *Saint Louis University Law Journal* 28(1), pp.33-40.
221. Sutherland, P.F. (1982). "The use of the letter rogatory for the purpose of obtaining evidence for proceedings in England and abroad." *International and Comparative Law Quarterly* 31(4), pp. 784-839.
222. Taguaba, L. (1978). "The Arusha Agreement: Origins, Meaning and Future of Association with the EEC". *African Review* 8(1-2), pp.156-184.
223. Tebaldi, M. and M. Calaresu (2013). "Level of Europeanization and Policy Outcomes: The Common Security Policy and the Case of Europol". *Sage Open*, pp.1-9.
224. The Common Law and Civil Law traditions. The Robbins Collection. School of law (Boalt Hall). University of California. Berkley. Accessed at [www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html](http://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html), on 15 May 2017.

225. Thelen, K. (1999). "Historical Institutionalism in Comparative Politics". *Annual Review of Political Science* 2, pp.369-404.
226. Thonke, O. and A. Spliid. (2012). "What to expect from regional integration in Africa". *African Security Review* 21(1), pp.42-66.
227. Tracogna, C. (2011). Ne bis in idem and conflicts of jurisdiction in the European area of liberty, security and justice. *Lex et Scientia International Journal* 18(2), pp.55-71.
228. TradeMark East Africa (2013). "Making regional integration in the EAC work". Policy Brief. Accessed at [www.trademarkea.com/resource-center/publications/page/6/](http://www.trademarkea.com/resource-center/publications/page/6/), on 25 June 2017.
229. Turner, J.L. (2007). "Transnational Networks and International Criminal Justice". *Michigan law Review* 105(5), pp.985-1032.
230. Valvis, A. I. (2008). "Regional Integration in Latin America". Institute of International Economic Relations, 51p.
231. Van Ballegooij, W., & Bard, P. (2016). "Mutual recognition and individual rights: Did the court get it right?". *New Journal of European Criminal Law* 7(4), pp.439-464.
232. Van Bockel, B. (2012). The ne bis in idem principle in the European Union legal order: between scope and substance. *ERA Forum* 13, pp.325-347.
233. Van der Mei, A.P. (2017). "The European Arrest Warrant system: Recent developments in the case law of the Court of Justice". *Maastricht Journal of European and Comparative Law* 2017. 24(6), pp.882-904.
234. Van Kleffens, E.N. (1949). "Regionalism and politics Pacts". *The American Journal of International law* 43(4), pp.666-678.
235. Van Sliedregt, E. (2007). "The European Arrest Warrant: Between trust, Democracy and the Rule of Law: Introduction. The European Arrest Warrant: Extradition in Transition". *European Constitutional Law Review* 3(2) pp.244-252.
236. Vandebroek, E and F Verbruggen (2013). "The EU and the death penalty abolition: The limited prospects of judicial cooperation in criminal matters as an external policy tool". *New Journal of European Criminal Law* 4(4), pp.481-505.

237. Vayrynen, R. (2003). "Regionalism: Old and New". *International Studies Review* 5, pp.25-51.
238. Ventrella, M. (2013). "European integration or democracy disintegration in measures concerning police and judicial cooperation". *New Journal of European Criminal Law* 4(3), pp.290-309.
239. Vermeulen, G. (2006). "A. EU conventions enhancing and updating traditional mechanisms for judicial cooperation in criminal matters". *ERES Revue Internationale de droit pénal* 1(77), pp.59-95.
240. Vervaele, J., A. (2005). "The transnational ne bis in idem principle in the EU. Mutual recognition and equivalent protection of human rights". *Utrecht Law Review* 1(2), pp.100-118.
241. Vervaele, J.A.E. (2013). "Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?" *Utrecht Law Review* 9(4), pp.211-229.
242. Viano, E.C. (2010). "Globalisation, Transnational Crime and State Power: The Need for a New Criminology". *Rivista di Criminologia, Vittimologia e Sicurezza* III (3), pp.63-85.
243. von Danwitz, T. (2001). The charter of fundamental rights of the European Union between political symbolism and legal realism. *Denver Journal of International Law and Policy*, 29(4), pp.289-3-4.
244. von Lampe, K. (2003). "The Use of Models in the Study of Organised Crime". Paper presented at the Conference of the European Consortium for Political Research. Berlin. 11p.
245. von Staden, A. (2016). "Subsidiarity, exhaustion of domestic remedies, and the margin of appreciation in the human rights jurisprudence of African sub-regional courts". *The International Journal of Human Rights* 20(8), pp.1113-1131.
246. Wade, M. L. (2013). "General Principles of Transnational Criminal justice? Exploratory Reflections". *Utrecht Law Review* 9(4), 165-183.
247. Wade, M. L. (2015). "Securing Defence Rights in Transnational Proceedings". *European Journal of Crime, Criminal law and Criminal Justice* 23(2), pp.145-169.

248. Warchol, G. (2004). "The Transnational Illegal Wildlife Trade". *Criminal Justice Studies* 17(1), pp.57-73.
249. Waters, M.A. (2005). "Mediating Norms and identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law". *The Georgetown Law Journal* 93, pp.487-574.
250. Weyembergh, A. (2013). "Coordination and initiation of investigations and prosecutions through Eurojust". *ERA Forum* 14(2), pp.177-186.
251. William, J. and E. Sheptycki (2007). "Transnational crime and transnational Policing". *Sociology Compass* 1(2), pp.485-498.
252. Wilson, T.J. (2016). "Criminal Justice and Global Public Goods: The Prum Forensic Biometric Cooperation Model". *The Journal of Criminal Law* 80(5), pp.303-326.
253. Woliver, L.R. (2002). Ethical Dilemmas in Personal Interviewing. *PS* 35(4), pp.677-678.
254. Yalem, R.J. (1962). "Regionalism and the World Order". *International Affairs* 38(4), pp. 460-471.
255. Zagaris, B. (1989-1990). "Development in International Judicial Assistance and Related Matters". *Denver Journal of International Law and Policy* 18(3), pp.339-386.
256. Zimmerbaum, K. and A. Paasi (2013). "When old and new regionalism collide: Deinstitutionalisation of regions and resistance identity in municipality amalgamations". *Journal of Rural Studies* 30, pp.31-40.
257. Zimmermann, F. (2015). "Conflicts of Criminal Jurisdiction in the European Union". *Bergen Journal of Criminal Justice* 3(1), pp.1-21.

#### **BOOK CHAPTERS**

1. Alemika Etannibi, E. O. (2013). "West Africa". In: Boll – Stiftung, H. (Ed.). *Transnational Organised Crime. Analyses of a Global Challenge to Democracy*. Transcript Verlag, pp.127-144.
2. Allegrezze, S. (2014). "Collecting Criminal Evidence Across the European Union: The European Investigation Order Between Flexibility and Proportionality". In: Ruggeri, S.

- (Ed.). *Transnational Evidence and Multicultural Inquiries in Europe*. London, Springer, pp.51-67.
3. Allot, A. (1976). "The Development of the East African Legal System during the Colonial Period". In: Low, D.A. and A. Smith. (Eds.). *History of East Africa*. Oxford, Clarendon Press, pp.348-382.
  4. Alusa, D. (2013). "Multipolar Politics and Regional Integration in East Africa: Opportunities and Challenges for Nonstate Actors". In: Omeje, K. and T.R. Hepner (Eds.). *Conflict and Peacebuilding in the African Great Lakes Region*. Indiana. University Press, pp.65-82.
  5. Bachmaier Winter, L. (2014). "The Proposal for a Directive on the European Investigation Order and Grounds for Refusal: A Critical Assessment". In: Ruggeri, S. (Ed.). *Transnational Evidence and Multicultural Inquiries in Europe*. London, Springer, pp.71-90.
  6. Baert, F., Scaramagli, T. and Söderbaum, F. (2014). "Introduction: Intersecting Interregionalism". In: Baert, F., Scaramagli, T. and Söderbaum, F. (Eds.). *Intersecting Interregionalism. Regions. Global Governance and the EU*. The Netherlands. Springer, pp.1-12.
  7. Belfiore, R. (2014). "Critical Remarks on the Proposal for a European Investigation Order and Some Considerations on the Issue of Mutual Admissibility of Evidence". In: Ruggeri, S. (Ed.). *Transnational Evidence and Multicultural Inquiries in Europe*. London, Springer, pp.91-105.
  8. Bell, S. (2002). "Institutionalism: Old and New". In: Summers, J. (Ed.). *Government, Politics, Power and Policy in Australia*. 7th ed. NSW Australia. Pearson Education, pp.1-16.
  9. Bøås, M. (2001). "Regions and regionalisation: A heretic's view". In: *Regionalism and Regional Integration in Africa. A Debate of Current Aspects and Issues*. Nordiska Afrika institutet Discussion Paper 11, Uppsala, pp.27-39.
  10. Buric, Z. (2016). "Transnational criminal proceedings and the position of the defence". In: Z. Đurđević and E Ivičević Karas (Eds.). *European Criminal Procedural Law in Service of Protection of European Union Financial Interests: State of Play and Challenges*. Croatian Association of European Criminal Law, pp.63-90.

11. Buscaglia, E. (2013). Judicial and social Conditions for the Containment of Organised Crime: A Best Practice Account. In: Boll –Stiftung, H. (Ed.). Transnational Organised Crime. Analyses of a Global Challenge to Democracy. Transcript Verlag, pp.61-73.
12. Cuyvers, A. (2017). The Institutional Framework of the EU. In: Ugirashebuja, E., Ruhangisa, J.E., Ottervanger, T. and A. Cuyvers (Eds.). East African Community Law. Brill Nijhoff. Leiden, pp.79-102.
13. Di Nicola, A. (2005). "Trafficking in Human Beings and Smuggling of migrants" In: Reichel, P. (Ed). Handbook of Transnational Crime and Justice. London, Sage Publications, pp.181-203.
14. Encyclopedia of Crime and Justice (2016). Organised Crime.
15. Fawcett, L. (1995). "Regionalism in Historical Perspective". In: Fawcett L. and A. Hurrell (Eds.). Regionalism in world politics: Regional organisations and international order. Oxford. University Press, pp.9-36.
16. Fawcett, L. (2005). "Regionalism from a Historical Perspective". In: Farrell, M., B. Hettne et. al. Global politics of Regionalism: Theory and Practice. London. Pluto Press, pp.21-37.
17. Fawcett, L. (2008). "Regionalism in World Politics: Past and Present". In: Kosler, A. and M. Zimmek (2008). Elements of regional integration. A Multidimensional Approach. Baden-Baden. Nomos, pp.15-28.
18. Felsen, D. and A. Kalaitzidis (2005). "A Historical overview of Transnational Crime" In: Reichel, P. (Ed.). Handbook of Transnational Crime and Justice. London. Sage Publications, pp.3-20.
19. Hettne, B. (1994). "The New Regionalism. Implications for development and peace". In: Hettne, B. & A. Inotai. The New Regionalism. Implications for Global Development and International Security. The United Nations University. World Institute for Development Economics Research. Forssan Kirjapaino Oy, pp.1-49.
20. Immergut, E. M. (2006). "Historical Institutionalism in Political Science and the Problem of Change". In: Wimmer, A. and R. Kössler (Eds.). Understanding Change. Palgrave Macmillan. UK, pp.237-259.



21. Joutsen, M. (2005). "International Instruments on Cooperation in Responding to Transnational Crime". In: Reichel, P. (Ed.). Handbook of Transnational Crime and Justice. Sage Publications, pp.286-309.
22. Joyce, E. (2005). "Expanding the International Regime on Money Laundering in Response to Transnational Organised Crime, Terrorism, and Corruption". In: Reichel, P. (Ed.). Handbook of Transnational Crime and Justice. London, Sage Publications, pp.79-97.
23. Kaahwa, W.T.K. (2017). "The Institutional Framework of the EAC". In: Ugirashebuja, E., Ruhangisa, J.E., Ottervanger, T. and A. Cuyvers (Eds.). East African Community Law. Institutional, Substantive and Comparative EU Aspects. Leiden, Brill Nijhoff. pp.43-78.
24. Matambalya, F.A.S.T. (2012). "The East African Community: Can it be a Model for Africa's Integration Process?". In: Mengisteab, K & R. Bereketeab (Eds.). Regional Integration, Identity and Citizenship in the Greater Horn of Africa. Boydell & Brewer. pp. 195-236.
25. Meyer, F. (2008, 2010). "Cooperation in Criminal Matters"
26. Mniwasa, E.E. (2004). "Detection and Suppression of Money Laundering in Tanzania". In: Goredema C. (Ed.). Tackling Money Laundering in East and Southern Africa: An Overview of Capacity. Institute for Security Studies Monograph 108, pp.37-94.
27. Page, S. (2001). "Regionalism and/ or Globalisation". In: Regionalism and Regional Integration in Africa. A Debate of Current Aspects and Issues. Nordiska Afrikainstitutet Discussion Paper 11, Uppsala, pp.5-26.
28. Puntigliano, R.A. (2013). "Geopolitics and Integration. A South American perspective". In: Puntigliano, R.A. and J. Briceño Ruiz (Eds.). Resilience of Regionalism in Latin America and the Caribbean. Hampshire. Palgrave Macmillan, pp. 19-52.
29. Rabatel, B. and O. Deparis (2015). " 'Liaison magistrates': Their Role in International Judicial Cooperation and Comparative Law". In: Andenas, M. and D. Fairgrieve (Eds.). Courts and comparative Law. Oxford University Press.
30. Radaelli, C. M. and V. Schmidt. (2005). "Policy Change and Discourse in Europe: Conceptual and Methodological Issues". In: Radaelli, C. M. and V. Schmidt (Eds.). Policy Change and Discourse in Europe. Routledge. Oxon. England, pp.1-28.

31. Rafaraci, T. (2014). "General Considerations on the European Investigation Order". In: Ruggeri, S. (Ed.). Transnational Evidence and Multicultural Inquiries in Europe. London, Springer, pp.37-44.
32. Ruggeri, S. (2014). "Introduction to the Proposal of a European Investigation Order: Due Process Concerns and Open issues". In: Ruggeri, S. (Ed.). Transnational Evidence and Multicultural Inquiries in Europe. London, Springer, pp.3-25.
33. Ruggeri, S. (2014). "Transnational Investigations and Prosecution of cross-Border Cases in Europe: Guidelines for a Model of Fair Multicultural Criminal Justice". In: Ruggeri, S. (Ed.). Transnational Evidence and Multicultural Inquiries in Europe. London, Springer, pp.193-228.
34. Ruhangisa, J.E. (2017). "The Scope, Nature and Effect of EAC Law". In: Ugirashebuja, E., Ruhangisa, J.E., Ottervanger, T. and A. Cuyvers (Eds.). East African Community Law. Institutional, Substantive and Comparative EU Aspects. Leiden, Brill Nijhoff, pp.139-160.
35. Schünemann, B. (2014). "Solution Models and Principles Governing the Transnational Evidence Gathering in the EU". In: Ruggeri, S. (Ed.). Transnational Evidence and Multicultural Inquiries in Europe. London, Springer, pp.161-180.
36. Schünemann, B. (2014). "The European Investigation Order. A Rush into the Wrong Direction". In: Ruggeri, S. (Ed.). Transnational Evidence and Multicultural Inquiries in Europe. London, Springer, pp.20-35.
37. Shaw, M. (2005). "Organised Crime in Africa". In: Reichel, P. (Ed.). Handbook of Transnational Crime and Justice. London, Sage Publications, pp.367-385.
38. Slaughter, A. M. (2011). "International Relations, Principal Theories". In: Wolfrum, R. (Ed.). Max Planck Encyclopedia of Public International Law. Oxford University Press. [www.princeton.edu/~slaughtr/Articles/722\\_IntlRelPrincipalTheories\\_Slaughter\\_20110509zG.pdf](http://www.princeton.edu/~slaughtr/Articles/722_IntlRelPrincipalTheories_Slaughter_20110509zG.pdf)
39. Stein, A. A. (2008). "Neoliberal institutionalism". In: Reus – Smit, C. and D., Snidal (Eds.). The Oxford Handbook of International Relations. New York. Oxford University Press, pp.201-221.

40. Steinmo, S. (2008). "What is Historical Institutionalism?". In: Della Porta, D. and M. Keating (Eds.). Approaches in the Social Sciences. University Press. Cambridge, pp.150-178.
41. Steinmo, S. (2015). "Institutionalism". International Encyclopedia of the Social & Behavioral Science. 2nd edition 12, pp.181-185.
42. Vogler R. (2013). "Report on England." In: Ruggeri S. (Ed.). Transnational Inquiries and the Protection of Fundamental Rights in Criminal proceedings. Messina, Springer, pp.387-398.
43. Vogler, R. (2011). "Making International Criminal Procedure Work: From Theory to Practice". In: Henham, R. and M. Fimdlay (Eds.). Exploring the Boundaries of International Criminal Justice. Aldershot, Ashgate, pp.105-128.
44. Vogler, R. (2014). "Criminal Evidence and Respect for Fair Trial Guarantees in the Dialogue Between the European Court of Human Rights and national courts". In: Ruggeri, S. (Ed.). Transnational Evidence and Multicultural Inquiries in Europe. London, Springer, pp.181-192.
45. Vogler, R. (2014). "The European Investigation Order: Fundamental Rights at Risks?". In: Ruggeri, S. (Ed.). Transnational Evidence and Multicultural Inquiries in Europe. London. Springer, pp.45-49.
46. Wennström, B. (2011). "In Search of a New lens". In: Bergstrom, M. and A.J. Cornell (Eds.). Interests and Actors in European Police and Criminal Justice Cooperation. Uppsala Faculty of Law Working Paper 2011:6c, pp.171-178.

## **BOOKS**

1. Bassiouni M. C. (2014). International extradition: United States Law and Practice. 6th Edition, Oxford, The University Press, USA, 1330p.
2. Fletcher, M., Lööf, R. and B. Gilmore (2008). EU Criminal Law and Justice. Edward Elgar Publishing Limited, Cheltenham, 235p.
3. Gardini, G. L. (2012). Latin America in the 21st century. London, Zeb Books, 152p.
4. Ibhawoh, B. (2013). Imperial Justice. Oxford, University Press, 240 Pages.
5. Lucas, C.P. (1904). Geography of South and East Africa. Oxford, Clarendon Press, 169p.
6. Morgan W. T. W. (1973). East Africa. London, Longman, 410p.

7. Obokata, T. (2010). *Transnational Organised Crime in International Law*. Bloomsbury Publishing Plc, 258p.
8. Shearer, I., A. (1971). *Extradition in International Law*. Manchester. The University Press, 291p.
9. Were, G.S. and Wilson, D.A. (1968). *East Africa Through a Thousand Years*. New York. African Publishing Corporation.

#### **INTERNATIONAL INSTRUMENTS AND OTHER LEGISLATIONS**

1. Commission Regulation 2017/1939 of Oct. 12, 2017, Implementing Enhanced Cooperation on the Establishment of the European Public Prosecutor's Office, 2017 O.J. (L 106).
2. Commission Regulation 2017/1939 of Oct. 12, 2017, Implementing Enhanced Cooperation on the Establishment of the European Public Prosecutor's Office, 2017 O.J. (L 106) 1, 1-71.
3. Directive (EU) 2015/849 of the European Parliament and of the council, of 20 May 2015, on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC.
4. Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law.
5. Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.
6. Directive (EU) 2019/713 of the European Parliament and of the Council, of 17 April 2019, on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA.
7. Directive 2008/99/EC of the European Parliament and of the Council, of 19 November 2008, on the protection of the environment through criminal law.

8. Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.
9. Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.
10. Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA.
11. Directive 2014/41/EU on the EIO in criminal matters.
12. FD 2002/584/JHA on the European Arrest Warrant and the surrender procedures between the Member States.
13. FD 2008/978/JHA on the EEW for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.
14. Joint Action 96/277/JHA on a framework for the exchange of liaison magistrates,
15. The African Charter on Human and Peoples' Rights (1986).
16. The Arab League Agreement on Extradition and Judicial Cooperation (1983).
17. The Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal (1989).
18. The Charter of Fundamental Rights of the EU (2000).
19. The Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971).
20. The Convention for the Suppression of Unlawful Seizure of Aircraft (1970).
21. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973).
22. The Convention on Mutual Assistance in Criminal Matters between the Member States of the EU (2000).
23. The Convention on offences and Certain Other Acts Committed on Board Aircraft (1963).
24. The Convention on the Elimination of All Forms of Discrimination against Women (1981).

25. The Convention on the Marking of Plastic Explosives for the Purpose of detection (1991).
26. The Convention on the Prevention of and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973).
27. The EAC Protocol on Peace and Security (2013).
28. The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).
29. The European Convention on Extradition (1958).
30. The European Convention on Mutual Assistance in Criminal Matters (1959).
31. The Inter – American Convention on Mutual Assistance in Criminal Matters (1992).
32. The International Convention against the Taking of Hostage (1979).
33. The International Convention for the Suppression of Terrorist Bombings (1997).
34. The International Convention for the Suppression of the Financing of Terrorism (1999).
35. The International Covenant on Civil and Political Right (1966).
36. The Montreal Protocol on Substances that Deplete the Ozone Layer (1987).
37. The Protocol on Combating Drug Trafficking in the East African Region (2001).
38. The Protocol on the Establishment of the East African Common Market (2009).
39. The Protocol on the establishment of the East African Customs Union (2004).
40. The Protocol on the establishment of the East African Monetary Union (2013).
41. The Schengen Agreement of 14 June 1985 between the governments of the states of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the gradual abolition of checks at their common borders and the subsequent Convention Implementing the Schengen Agreement on 19 June 1990.
42. The Treaty establishing the African Economic Community (1991).
43. The Treaty for East African Cooperation (1967).
44. the Treaty for the establishment of the EAC (2000).
45. The Treaty on EU (1992).
46. The Treaty on the Functioning of the EU (2007).
47. The UN Charter (1945).
48. The UN Convention against Corruption (2003).

49. The UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988).
50. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).
51. The UN Convention Against Transnational Organised Crime 2000 (and the first Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children (2003) as well as the second Protocol against the Smuggling of Migrants by Land, Sea and Air (2004).
52. The UN Model Treaty on Extradition (1990).
53. The UN Model Treaty on Mutual Assistance in Criminal Matters (1990).

### **JUDGMENTS**

1. EACJ, Ref. N° 1 of 2007) [2007] EACJ 3 (1 November 2007), Katabazi and 21 Others v. Secretary General of the East African Community and Another.
2. EACJ, Ref. N° 7 OF 2013 [2013]. Burundian Journalists Union v. The Attorney General of the Republic of Burundi.
3. EACJ, Ref. N°8 of 2010) [2010] EACJ & (APPEAL N°1 OF 2012, Plaxeda Rugumba v. The Secretary General of the EAC and the Attorney General of the Republic of Rwanda.
4. ECJ, Case 11/70, Internationale Handelsgesellschaft [1970] ECR 1125.
5. ECJ, Case C-303/05 [2007], Advocaten voor de Wereld VZW v. Leden van de Ministerraad.
6. ECJ, Joined cases C-187/01, Hüseyin Gözütok, and C-385/01, Klaus Brügge [2003].
7. ECJ, Joined Cases C-404/15 and C-659/15 PPU Aranyosi and Căldăraru [2016].

### **REPORTS**

1. CITES (2014). *Interpretation and implementation of the Convention. Species trade and conservation. Elephants. Elephant conservation, illegal killing and ivory trade*. 65<sup>th</sup> meeting of the Standing Committee. 38p.
2. Commission of the European Communities (2004). *Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union*. Brussels, 94p.

3. East African Community (2015). Study to assess transnational organised crime and terrorism in the EAC region. 59p.
4. FATF (2012-2017). International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation, 128p.
5. IMF (2015). Rwanda. Detailed Assessment Report –Anti-Money Laundering and Combating the Financing of terrorism. 403p.
6. International Narcotics Control Strategy Report INCSR II (2014). Money laundering and Financial Crimes. United States Department of State. 460p.
7. International Narcotics Control Strategy Report INCSR II (2017). Money laundering and Financial Crimes. United States Department of State. 203p.
8. OECD (2009). Money Laundering Awareness Handbook for Tax Examiners and Tax Auditors. 49p.
9. Society for International Development (2012). The State of East Africa. 90p.
10. Society for International Development (2013). The State of East Africa. 114p.
11. Society for International Development. The State of East Africa Report Series. Legal Status of Laws. Accessed at [www.inequalities.sidint.net/soear/intergration-tracker/legal-status-of-laws](http://www.inequalities.sidint.net/soear/intergration-tracker/legal-status-of-laws), on 15 May 2017.
12. The Economist Intelligence Unit. Democracy Index 2019, 69p.
13. The House of Lords and the House of Commons Joint Committee on Human Rights (2011). The Human Rights Implications of the United Kingdom Extradition Policy. Report of the Joint Committee on Human Rights. 72p.
14. The Sentry (2015). Country Briefs: South Sudan. 9p.
15. The Sentry (2016). War Crimes Shouldn't Pay. 43p.
16. The Sentry (2017). Making Fortune While Making a Famine. 15p.
17. United States Department of State (2016). Country Reports on Terrorism 2015, 407p.
18. UNODC (2009). "Organised Crime and Trafficking in Eastern Africa". Paper. Regional Ministerial Meeting on Promoting the Rule of Law and Human Security in Eastern Africa, Nairobi, 48p.



19. UNODC (2009). *Manual on International Cooperation in Criminal Matters related to Terrorism*. 259p.
20. UNODC (2010). *The Globalisation of Crime. A Transnational Organized Crime Threat Assessment*. Vienna, 303p.
21. UNODC (2011). *Organised Crime and Instability in Central Africa*. Vienna, 10p.
22. UNODC. (2013). *Transnational Organised Crime in Eastern Africa: A Threat Assessment*. Vienna, 48p.
23. World Bank. East African Community Secretariat (2014). *EAC Common Market Scorecard: Tracking EAC Compliance in Movement of Capital, Services and Goods*. 106p.

#### **MEDIA ARTICLES**

1. Ainebyoona, E. "Uganda confiscates 4,000 kgs of ivory as trafficking increases". Daily Monitor. 6 March 2016. Accessed at [www.monitor.co.ug/Business/Markets/Uganda-confiscates-4-000-kgs-of-ivory-as-trafficking-increases](http://www.monitor.co.ug/Business/Markets/Uganda-confiscates-4-000-kgs-of-ivory-as-trafficking-increases), on 10 October 2017.
2. Anami, L. "Experts suggest models for EAC political union". The Standard (27th November 2012), p.1 (Online), <https://www.standardmedia.co.ke/article/2000071581/experts-suggest-models-for-eac-political-union>, accessed on 12 May 2017.
3. Dearden, L. "Isis: New terrorist group Jahba East Africa pledges allegiance to 'Islamic State' in Somalia" Independent. 8 April 2016. Accessed at [www.independent.co.uk/news/world/africa/isis-new-terrorist-group-jahba-east-africa-pledges-allegiance-to-islamic-state-in-somalia-a6974476.html](http://www.independent.co.uk/news/world/africa/isis-new-terrorist-group-jahba-east-africa-pledges-allegiance-to-islamic-state-in-somalia-a6974476.html), on 4 October 2017.
4. DeFreese, M. "New Fronts Emerge in Africa's "Arc of Terrorism"". Huffpost. 5<sup>th</sup> August 2016, at [www.huffpost.com/entry/new-fronts-emerge-in-afri b 9865112](http://www.huffpost.com/entry/new-fronts-emerge-in-afri b 9865112), accessed on 4 October 2017.
5. East Africa: Kenya Sees Progress in Counter-Terrorism Amid Reduced Attacks. All Africa. 18 January 2017, at [www.allafrica.com/stories/201701180003.html](http://www.allafrica.com/stories/201701180003.html), accessed on 4<sup>th</sup> October 2017.
6. Haenlein, C. "How severe is the terror or threat in East Africa?". BBC Africa. 20 July 2015, at [www.bbc.co.uk/news/world-africa](http://www.bbc.co.uk/news/world-africa), accessed on 4 October 2017.

7. Ligami, C. "Three countries renew push for EAC political federation by 2016.The East African. 14<sup>th</sup> March 2015, at [www.theeastafrican.co.ke/news/Three-countries-renew-push-for-EAC-political-federation-by-2016-/2558-2653442-10iy0uvz/index.html](http://www.theeastafrican.co.ke/news/Three-countries-renew-push-for-EAC-political-federation-by-2016-/2558-2653442-10iy0uvz/index.html), accessed on 10 April 2015.
8. Masinde J. "US State Dept thinks Africa's leading mobile money platform is vulnerable to money laundering". Quartz Africa. 6 March 2017, at [www.qz.com/africa/924977/us-state-dept-thinks-africas-leading-mobile-money-platform-is-vulnerable-to-money-laundering/BOOK CHAPTERS](http://www.qz.com/africa/924977/us-state-dept-thinks-africas-leading-mobile-money-platform-is-vulnerable-to-money-laundering/BOOK CHAPTERS), accessed on 15 September 2017.
9. Muvunyi, F. "Tanzania's Magufuli leads fight against corruption". DW. 12 May 2016, at. [www.dw.com/en/tanzanias-magufuli-leads-fight-against-corruption/a-19252614](http://www.dw.com/en/tanzanias-magufuli-leads-fight-against-corruption/a-19252614), accessed on 1<sup>st</sup> October 2017.
10. Ng'wanakilala, F. "Tanzanian President sacks port chief in anti-graft campaign". Reuters. 8<sup>th</sup> December 2015, at [www.reuters.com/article/ozatp-uk-tanzania-politics-](http://www.reuters.com/article/ozatp-uk-tanzania-politics-), accessed on 2<sup>nd</sup> October 2017.
11. Nyakachunga, V. "Top 5 Corruption Cases that Remain Unsolved in Kenya". Kenyans.CO.KE. 1<sup>st</sup> March 2016, at [www.kenyans.co.ke/news/top-5-corruption-cases-remain-unresolved-kenya](http://www.kenyans.co.ke/news/top-5-corruption-cases-remain-unresolved-kenya), accessed on 1<sup>st</sup> October 2017.
12. "Police arrest 10 over ivory trade". The New Times. 20 August 2016, at [www.newtimes.co.rw/section/read/202770/](http://www.newtimes.co.rw/section/read/202770/), accessed on 13 October 2017.
13. Ubwani, Z. "Poaching Poses Security Threat in East Africa. The Citizen. The Citizen. 13 September 2016, at [www.thecitizen.co.tz/News/Poaching-poses-security-threat-in-E-Africa--report](http://www.thecitizen.co.tz/News/Poaching-poses-security-threat-in-E-Africa--report), accessed on 10 October 2017.
14. Ugandan authorities seize a tonne of ivory. New Vision. 21<sup>st</sup> February 2017, at [www.newvision.co.ug/new\\_vision/news/1446682/ugandan-authorities-seize-tonne-ivory](http://www.newvision.co.ug/new_vision/news/1446682/ugandan-authorities-seize-tonne-ivory), accessed on 10<sup>th</sup> October 2017.

#### **OTHER ELECTRONIC SOURCES**

1. African Union Peace and Security. The African Union-Led Regional Task Force for the elimination of the LRA, at [www.peaceau.org/en/page/100-au-led-rci-lra-1](http://www.peaceau.org/en/page/100-au-led-rci-lra-1), accessed on 9<sup>th</sup> October 2017.

2. Corruption Perceptions Index 2016, at [www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016](http://www.transparency.org/news/feature/corruption_perceptions_index_2016), accessed on 10<sup>th</sup> July 2017.
3. Fighting Wildlife Trade in Kenya (September 2014.) UN Chronicle LI(2). [www.unchronicle.un.org/article/fighting-wildlife-trade-kenya](http://www.unchronicle.un.org/article/fighting-wildlife-trade-kenya), accessed on 10 October 2017.
4. Global Centre on Cooperative Security (2014). Tracking Progress. AML/CFT Developments in East Africa and the Greater Horn. [https://www.globalcenter.org/wp-content/uploads/2014/08/AML\\_CFT-Developments-in-East-Africa.pdf](https://www.globalcenter.org/wp-content/uploads/2014/08/AML_CFT-Developments-in-East-Africa.pdf), accessed on 15 July 2017.
5. [https://eur-lex.europa.eu/summary/glossary/consultation\\_procedure.html](https://eur-lex.europa.eu/summary/glossary/consultation_procedure.html), accessed on 20<sup>th</sup> August 2019, accessed on 20<sup>th</sup> August 2019.
6. <https://www.deathpenaltyproject.org/2017/12/14/kenyan-supreme-court-declares-mandatory-death-penalty-unconstitutional/>, on 1 November 2018.
7. Karuhanga, J. (April 5, 2017). "Regional MPs weigh in on ratification of EAC Peace and Security Protocol". The New Times. April 5, 2017, accessed on 10<sup>th</sup> May 2017. <https://www.newtimes.co.rw/section/read/210169KnowYOurCountry>. South Sudan. [www.knowyourcountry.com/southsudan1111](http://www.knowyourcountry.com/southsudan1111), Consulted on 3<sup>rd</sup> October 2017.
8. Open Society Justice Initiative (2013). Fact Sheet. East African Court of Justice. [www.opensocietyfoundations.org/sites/default/files/fact-sheet-east-african-court-justice-20130627.pdf](http://www.opensocietyfoundations.org/sites/default/files/fact-sheet-east-african-court-justice-20130627.pdf), accessed on 18 July 2018.
9. The European Investigation Order. [www.app.college.police.uk/app-content/investigations/european-investigations/european-investigation-order/](http://www.app.college.police.uk/app-content/investigations/european-investigations/european-investigation-order/), accessed on 25 May 2018.
10. TRAFFIC. Sophisticated poachers could undercut bold Kenyan fight against wildlife crime in this key African transit country. [www.traffic.org/home/2016/5/9/sophisticated-poachers-could-undercut-bold-kenyan-fight-agai.html](http://www.traffic.org/home/2016/5/9/sophisticated-poachers-could-undercut-bold-kenyan-fight-agai.html), accessed on 10 October 2017.

11. Traffic. Uganda to return 2.9 tonnes of impounded ivory to ivory trafficking suspects. 27 July 2014. [www.traffic.org/home/2014/2/27/uganda-to-return-29-tonnes-of-impounded-ivory-to-ivory-traff.html](http://www.traffic.org/home/2014/2/27/uganda-to-return-29-tonnes-of-impounded-ivory-to-ivory-traff.html), accessed on 10 October 2017.
12. United States Department of State. Tanzania 2016 Crime & Safety Report. [www.osac.gov/pages/ContentReportDetails.aspx?cid=19739](http://www.osac.gov/pages/ContentReportDetails.aspx?cid=19739), accessed on 4 Oct 2017.
13. UNODC. Eastern Africa: UNODC to address rising environmental crime. 20 November 2009. [www.unodc.org/unodc/en/frontpage/2009/November/eastern-africa-unodc-to-address-rising-environmental-crime](http://www.unodc.org/unodc/en/frontpage/2009/November/eastern-africa-unodc-to-address-rising-environmental-crime), accessed on 10 Oct 2017.
14. UNODC. Environmental crime: trafficking in wildlife and timber. <http://www.unodc.org/toc/en/crimes/environmental-crime.html>, accessed on 10 Oct 2017.

## APPENDIX

### **APPENDIX 1**

#### **FIELDWORK SHORT NARRATIVE**

My research qualitative methodology included fieldwork. The latter was mainly an elite interviewing of various leaders in the EAC. Initially, I planned to interview a broad range of leaders in senior position including top leaders at the EAC, Attorney General Offices, police Chiefs, as well as judges and prosecutors in the Partner States. However, having thought deeply about the objectives of the interviews and having considered my supervisors' advices, I revised the plan and I narrowed down the list of the proposed interviewees. I decided to focus essentially on the EAC itself and not the Partner States. After all, one objective of my research is to influence the EAC to adopt mechanism for cooperation in criminal matters. So, I decided to interview only top leaders at the EAC as follows: The Secretary General, the President of the EACJ (President of the Appellate Division), the Principal Judge of First Instance, the Speaker, 5 Members of Parliament representing each EAC Partner State, and the Head of Legal Department. The purpose of the interviews was to obtain the perception of the EAC leaders on my research assumptions, to hear their views on a possible mechanism for cooperation in criminal matters, to find out what the EAC has achieved so far and what it has planned in relation to my research questions, and to obtain any other important piece of information that may be useful to my research. The fieldwork was also a way for raising awareness for my PhD research at the EAC and attracting the interest of the institution as I hope my research findings contribute to develop a cooperation mechanism in the fight against transnational organized crime in the EAC.

I was lucky enough to be able to interview the Speaker of the EALA who was enthusiastic about my research which he strongly supported. I also interviewed four Members of EALA each representing a Partner State. I managed to interview the President of the EACJ too, the Principal Judge of the First Instance and the Head of the Legal Department. Of the ten proposed participants, I have not been able to interview the Secretary General due to time constraints, and a member of the EALA representing Tanzania who did not respond to the interview invitation.

Generally speaking, all participants to my interviews showed interest in my research. The President of the EACJ and the Speaker of the EALA noted the lack of legal research and particularly research on criminal matters in the EAC. They encouraged me to share my research findings and results with the Community.

The interviews helped me collect useful data from the field. Through discussions with members of the Secretariat at the EAC, I gained a better understanding of the functioning of the institution.

I was able to draw a few tentative conclusions from my interviews. Firstly, the interviews confirmed my intuition and my research assumption that cooperation in criminal matters lacks in the EAC. All participants agreed that cooperation in criminal matters within EAC is of ultimate importance and timely. They all agreed that free movement of people requires a cooperation mechanism to ensure justice is done and to prevent criminals move freely across the national borders. So, they support the idea that the EAC moves from bilateral arrangements to a regional framework of cooperation in criminal matters. I was therefore informed that EAC has just adopted a Protocol on peace and security, which, was then pending ratification from one or two Partner States. Secondly, several other themes emerged from my interviews such as transnational organized crime as a threat in the EAC and the basis for developing a cooperation mechanism; human rights and the need to develop a standard within EAC.

One interesting aspect of the interviews was the differences in the backgrounds of the participants, which I could tell from their answers to my questions. I learned later some were lawyers, some other economists, sociologists, and one is even nutritionist with considerable career experience in politics. So, with such a multi-disciplinary experienced set of interviewees, the answers to my questions considered governance, law, politics and sociology. I found the opinions of the participants fascinating and useful to my research. The differences in their background were inspiring with regard to methodological approach for future researches. I was satisfied by the participants' answers which helped to answer my research questions and to build good arguments.

The field research was a great adventure and a learning experience from the challenges that I encountered. The challenges were twofold: organizational and logistical on the one hand, and technical on the other hand. My case study being the EAC which headquarters are located in Arusha, Tanzania, I had first to fly to my country of origin, Rwanda, to organize the interviews and, later on, fly to Arusha. The process is costly and time consuming. I realized that I could not expect to hear from the proposed participants until I met them in person. The point here is that organizing field work from distance is such a challenge that one cannot understand until they face it.

One issue I particularly had to consider in planning the meetings is that some of the proposed participants to my interviews work at the EAC on full-time basis with a permanent residence in Arusha, for example, the Secretary General, the President of the Court, the Principal Judge at the First Instance Division and the Speaker, while others like the Members of the EALA work on a part-time basis and do not hold a full residence in Arusha. This means I had to be in Arusha at least when the EALA was sitting. The perfect period was the 6<sup>th</sup> meeting of the 3<sup>rd</sup> session of the 3<sup>rd</sup> Assembly which was scheduled from 10<sup>th</sup> to 22<sup>nd</sup> May 2015.

At this stage, the next challenge was the participants' availability as they usually have very tight schedules. Members of the EALA were very busy attending the plenary and standing committees' meetings during the 10 days of the session meeting. The only alternative I had was to interview them either at lunch break, in the evening after work, in the weekend or on the days they did not

have any plenary meeting. So, it was challenging to interview them as they sometimes had other urgent matters to sort out in their free time. I was sometimes left hours and days before I managed to interview a participant.

In addition to their tight schedules, EAC officials often travel away. Just as an example, the President of the Court travelled to Dar-es-Salam, to Poland and to Uganda just in a space of two weeks. When I interviewed him in office, he was back from Poland the day before and he was travelling to Uganda the following day. Similarly, I interviewed the Acting Head of Legal Department at EAC on Saturday after he arrived back from Rwanda on Friday and he was travelling to Dar-es-Salam on the following Monday. They both agreed to be interviewed despite their tight schedules. However, I was not lucky enough to interview the Secretary General who travelled to Dar-es-Salam and Brussels for meetings about the political crisis then in Burundi.

Participants' consent to be interviewed and to be recorded was another challenge which I dealt with rather well for two reasons. Firstly, my research sounded appealing to the participants. Secondly, the EAC internal policies encourage information to public. The EAC is a people centered and private sector driven integration. So, it has got a strong customer care culture that facilitates access to information. However, I would certainly hardly reach the participants if I had not sent out my interview questions and my credentials to the Public Relations Officer at the EALA, who helped identify suitable participants and introduced me to them. That facilitated a positive and quick response to my interview invitation and a consent to be interviewed and recorded.

Last and not least challenge I encountered was managing my field research data and adjusting to local resources. Having lived in the UK for a while, I forgot East African realities such as frequent power cuts. I lost a few interviews that I transcribed on my laptop while staying in Arusha, after an evening power cut at my hotel which caused my laptop battery run out before I had the chance to save the interviews. I had to find time to type the interviews again. Although that experience wasted my time, I learned from it for future field researches. Also, conducting elite interviews with limited fund can be challenging at times when the weather is not favourable. On a few occasions, sudden heavy rain was challenging, especially when I had to move to the EAC Headquarters on a motorbike, the cheapest common transport means in Arusha, and expect to keep smart and clean at my elite interviews, and not wet and muddy.

The field research was overall rewarding, in terms of data and information I needed, and in terms of professional networking and awareness on my research.

## APPENDIX 2

### INTERVIEW QUESTIONS

#### I. THE EALA

##### - THE SPEAKER

##### - 5 MEMBERS REPRESENTING THE PARTNER STATES

1. The United Nations stresses the need to fight transnational crime and it calls upon States to cooperate to that end as a matter of urgency. To what extent do you think the EAC needs to address transnational organized crime and develop mechanisms to confront it?
2. What could be the challenges of international cooperation in criminal matters in the EAC?
3. To what extent do you think the differences in the legal systems of EAC Partner States could hamper international cooperation in EAC and how could the situation be resolved?
4. As an area of free movement and with regard to the ultimate political federation objective of the EAC, what do you think of a suggestion that the EAC becomes a legal area where cooperation would move from the domain of national foreign affairs to that of the judiciary?
5. In a request for assistance, should the requested state apply its law, or should the law of the requesting state apply?
6. Should a request for assistance entail an obligation to the requested state or should the latter have a margin of appreciation to accept or not the request? If yes, should that margin be absolute or relative?
7. What is your opinion on our research's assumption that the EAC, as a sub-regional organization with the ultimate goal of political federation, needs to develop a regional mechanism of cooperation among the Partner States in criminal matters?
8. Given the complexity of transnational proceedings and the difficulty they engender in terms of enforcing human rights, to what extent do you think it would be worth setting human rights specific standard applicable to any possible EAC international cooperation instruments?
9. Should transnational proceedings in EAC ignore any test of compliance with human rights standards or should Partner States adopt a mutual recognition of decisions as in the European Union?
10. Would you support that an EAC instrument on mutual assistance in criminal matters provides for an explicit ground for refusal to cooperate in case a request violates human rights, e.g. in the enforcement of a judgment?



## II. THE EACJ

### - THE PRESIDENT OF THE APPELLATE DIVISION

### - THE PRINCIPAL JUDGE OF THE FIRST INSTANCE

1. What is your opinion on our research's assumption that the EAC, as a sub-regional organization with the ultimate goal of political federation, needs to develop a regional mechanism of cooperation among the Partner States in criminal matters?
2. What could be the challenges of international cooperation in criminal matters in the EAC?
3. To what extent do you think the differences in the legal systems of EAC Partner States could hamper international cooperation in EAC and how could the situation be resolved?
4. Considering the fundamental principles of the Community, particularly the promotion and protection of human and people's rights, what fundamental rights should be guaranteed in transnational proceedings involving international cooperation?
5. Given the complexity of transnational proceedings and the difficulty they engender in terms of enforcing human rights, to what extent do you think it would be worth setting human rights specific standard applicable to any possible EAC international cooperation instruments?
6. How could a test of compliance with human rights standards be envisaged in transnational proceedings in EAC?
7. Should transnational evidence gathering be subject to a test of necessity, proportionality and perhaps appropriateness?
8. Should transnational proceedings in EAC ignore any test of compliance with human rights standards or should Partner States adopt a mutual recognition of decisions as in the European Union?
9. How could issues such as legality and admissibility of obtained evidence in a transnational inquiry in EAC be addressed, considering the differences in national rules of procedure and evidence?
10. Considering the need for protecting fundamental rights against possible infringements in transnational proceedings, do you think there should be limitations or safeguards, e.g. with regard to transmission of information from a state to another state and the right to privacy?
11. Should safeguards against abuses operate prior to the execution of a request for assistance, e.g. by means of a judicial scrutiny approval, or should it be a control mechanism operating after execution of a request for assistance, e.g. a special legal remedy, or during the trial phase in the requesting state?
12. What mechanism would you propose to ensure a judicial scrutiny approval of a request for assistance does not conflict with states sovereignty and the customary international law rule of non-inquiry?
13. As an area of free movement and with regard to the ultimate political federation objective of the EAC, should the latter become a legal area where cooperation would move from the domain of national foreign affairs to that of the judiciary?
14. What information would the requested state need if it has to test the legitimacy and proportionality of a request for assistance?

15. What other practical institutional mechanism supplementing the more classic extradition and mutual legal assistance would you suggest in order to facilitate international cooperation in the EAC and to overcome the challenge of the rule of non-inquiry?
16. In a request for assistance, should the requested state apply its law, or should the law of the requesting state apply?
17. Should a request for assistance entail an obligation to the requested state or should the latter have a margin of appreciation to accept or not the request? If yes, should that margin be absolute or relative?

### III. THE COUNSEL (LEGAL ADVISOR)

1. Considering the objective of the EAC to develop policies and programmes aimed at widening and deepening cooperation among the Partner States in, amongst others, defence, security and legal and judicial affairs, to what extent is cooperation in criminal matters a perspective for the Community?
2. With regard to regionalism as a way to respond to global and regional problems, and given the ultimate objective of the EAC to become a political federation, how is the Community concerned by transnational organized crime?
3. What is your view on our research's assumption that EAC states should move from bilateral cooperation instruments to regional instruments that would apply to all Partner States in criminal matters?
4. In your view, what political or legal obstacles could hinder legal cooperation in East Africa?
5. To what extent do you think the differences in the legal systems of EAC Partner States could hamper international cooperation in EAC and how could the situation be resolved?
6. Considering the fundamental principles of the Community, particularly the promotion and protection of human and people's rights, what fundamental rights should be guaranteed in transnational proceedings involving international cooperation?
7. What principles or values, in your view, should cooperation in criminal matters in EAC reflect?
8. Given the complexity of transnational proceedings and the difficulty they engender in terms of enforcing human rights, to what extent do you think it would be worth setting human rights specific standard applicable to any possible EAC international cooperation instruments?
9. Should transnational proceedings in EAC ignore any test of compliance with human rights standards or should Partner States adopt a mutual recognition of decisions as in the European Union?
10. Would you support that an EAC instrument on mutual assistance in criminal matters provides for an explicit ground for refusal to cooperate in case a request violates human rights, e.g. in the enforcement of a judgment?
11. How could EAC address issues such as legality and admissibility of obtained evidence in a transnational inquiry, considering the differences in national rules of procedure and evidence?
12. Considering the need for protecting fundamental rights against possible infringements in transnational proceedings, do you think there should be limitations or safeguards, e.g. with regard to transmission of information from a state to another state and the right to privacy?
13. Should safeguards and limitations apply in requests for assistance from non-EAC member States as well?
14. Should safeguards against abuses operate prior to the execution of a request for assistance, e.g. by means of a judicial scrutiny approval, or should it be a control mechanism operating after execution of a request for assistance, e.g. a special legal remedy, or during the trial phase in the requesting state?
15. In case the three scenarios in question 15 above are all provided for to guarantee a maximum protection of human rights, what could be the danger of leaving the option to states to require either a judicial approval or a control after the facts, bearing in mind divergences in the states' practices?

16. If requests for assistance within the EAC had to be approved after a judicial scrutiny, what would you advise to avoid such scrutiny conflicts with states sovereignty and the customary international law rule of non-inquiry?
17. As an area of free movement and with regard to the ultimate political federation objective of the EAC, what do you think of a suggestion that the EAC becomes a legal area where cooperation would move from the domain of national foreign affairs to that of the judiciary?
18. What other practical institutional mechanisms supplementing the more classic extradition and mutual legal assistance would you suggest in order to enhance international cooperation in the EAC and to overcome the challenge of the rule of non-inquiry?
19. In a request for assistance, should the requested state apply its law, or should the law of the requesting state apply?
20. Should a request for assistance entail an obligation to the requested state or should the latter have a margin of appreciation to accept or not the request? If yes, should that margin be absolute or relative?

**APPENDIX 3****CONSENT FORM FOR PROJECT PARTICIPANTS**

PROJECT TITLE:

International cooperation in criminal matters. A case study of the East African Community (EAC)

Project Approval

Reference:

I agree to take part in the above University of Sussex research project. I have had the project explained to me and I have read and understood the Information Sheet. I understand that agreeing to take part means that I am willing to:

- Be interviewed by the researcher
- Allow the interview to be audio taped and transcribed

I understand that the researcher will keep my identity anonymous and will not mention either my name or any other thing that will directly disclose my identity as the respondent. I also understand that, all records will be kept safely by the researcher and will be used strictly and reasonably for the purpose of this research and that all voice records or document emanating from me will neither be transferred to other persons or bodies outside the purpose of this research.

AND

I understand that, if I make a request, I will be given a transcript of data concerning me for my approval before being included in the write up of the research.

I also understand that I can withdraw at any time from participating in this research and I can as well request that all information I have given to be excluded from any part of this research, and be destroyed.

I understand that my participation is voluntary, that I can choose not to participate in part or all of the project, and that I can withdraw at any stage of the project without being penalised or disadvantaged in any way.

I consent to the processing of my personal information for the purposes of this research study. I understand that such information will be treated as strictly confidential and handled in accordance with the Data Protection Act 1998.

Name\_\_\_\_\_

Signature\_\_\_\_\_

Date\_\_\_\_\_

## APPENDIX 4

### PARTICIPANT INFORMATION SHEET

#### STUDY TITLE:

INTERNATIONAL COOPERATION IN CRIMINAL MATTERS. A CASE STUDY OF THE EAST AFRICAN COMMUNITY (EAC)

#### INVITATION PARAGRAPH

You are being invited to participate in this research. Before you decide whether or not to take part, it is important that you understand the rationale for this research, the objective behind doing the research and indeed what this research will involve. Please take time to read the following information which narrates the issues around the research and the procedure through which it is intended to be carried out.

#### WHAT IS THE PURPOSE OF THE STUDY?

This study is conducted as part of a PhD at the University of Sussex. The study aligns itself with the objectives of the East African Community (EAC) to develop policies and programmes aimed at widening and deepening cooperation among the Partner States in, among other fields, defence, security and judicial affairs. It aims at proposing a legal and institutional mechanism for cooperation in criminal matters adapted to the needs and to the context of the EAC. In September 2013, an assessment conducted by the United Nations and focused on transnational organized crimes such as trafficking of people (migrants) and drugs (heroin), piracy and wildlife poaching revealed their threat to the region. Also, the international community recognizes international cooperation in criminal matters as an urgent necessity and a response to transnational crime. The study intends to explore regionalism as a device for cooperation in the EAC, drawing from the experience of other regional organizations like the European Union. The study will explain the reasons law enforcement agencies and the criminal justice actors in the EAC need to cooperate. The study will also analyse the legal systems within EAC to understand their specificity. An attention will be given to the understanding of the decision-making system of the EAC. It is hoped that the outcome of the study will encourage the EAC legislator to adopt mechanisms of cooperation in criminal matters. The study is scheduled to end in September 2016.

#### WHY HAVE I BEEN INVITED TO PARTICIPATE?

The study intends to interview elites who are in a decision making position in the EAC Partner States as well as at the EAC institutional level as to engage them in the project that we think benefits the East African Community and its members. The study also seeks to interview professionals and officials involved in the adjudication of transnational organized crimes in the EAC Partner States. The views, the opinions and the hands on experience of the interviewees are expected to be a great insight to the study. You have been chosen because you fall in any category of the interviewees described above. Your views and opinions are important for the whole purpose of this study.

#### DO I HAVE TO TAKE PART?

It is absolutely your discretion whether or not to take part in this research. If you do decide to take part you will be given this information sheet to keep which will be accompanied with a consent form for you to sign. More so, you are at liberty to withdraw from participating in this research at any time and without giving a reason.

#### WHAT WILL HAPPEN TO ME IF I TAKE PART?

In this research, it is intended to have some exclusive interview with you which will be audio taped then transcribed or by note taking. Putting into account your work and schedules, it is intended that some flexibility will be created that will fit in with your convenience. The research is an academic work. And in every circumstance, care will be taken not to do anything that will be detrimental to you, your family, your community, your work, your personality and your integrity.

#### WHAT ARE THE POSSIBLE DISADVANTAGES AND RISKS OF TAKING PART? (WHERE APPROPRIATE)

It is expected that this research work will not have any risk or disadvantage on you. The main demand will be to have a face to face interview of an average of 45 minutes to 1 hour with you and where for any reason that becomes unlikely or inconvenient, then an alternative request will be made for a telephone interview or a skype interview. This will entail calling you at your own time, in which case the interview will not last for more than 35 minutes. The choice of place for the interview is subject to your convenience. You are also at absolute liberty to decline taking part in this research without necessarily given any reason for your decline.

#### WHAT ARE THE POSSIBLE BENEFITS OF TAKING PART?

Your participation to this study will help understand the decision making system of the EAC, the perception of EAC about the subject of the study, the problems of transnational organized crime in East Africa or the implications of cooperation among the criminal justice systems of the EAC Partner States. This study has been inspired by a citizenship desire to contribute to the building up of the EAC, since little has been written and researched on the Community and much is written by outsiders who do not always understand the local context. Your participation will be a great support and encouragement to the academic and scientific information that the study will generate to the public.

#### WILL MY INFORMATION IN THIS STUDY BE KEPT CONFIDENTIAL?

##### Recording

It is intended that all interviews will be recorded on audio and every part of such interview conducted will be transcribed and used exclusively during the analysis of data. Likewise, every part of such recorded data shall be kept on a secure computer and will not be shared with any other person or for any other purpose but this study; and such information will be completely deleted from any storage within one year of the interview.

##### Confidentiality

Every effort will be made to be honest with you on the reason and objectives of the study. This is also followed by the assurance of confidentiality of information. This study will ensure that everything you disclose remains anonymous and not linked directly to your identity. After transcribing the interview, the confidential transcript will be sent to you for approval.

### Safety of participants

In the cause of this study, nothing will be done directly or indirectly which is capable of putting your name, family, community, work, contact, discussions, recordings, and opinion in jeopardy. Likewise nothing will be included in this study which will affect job, integrity or safety of you or anyone directly or indirectly involved.

### WHAT SHOULD I DO IF I WANT TO TAKE PART?

If you intend to take part, you can email me, write a letter to me or inform me via any means of communication.

My contacts details are as follows:

Sibo Yves Gahizi

Email: S.gahizi@sussex.ac.uk

Telephone: +447884750666

15A, Langdale road

BN3 4HQ

UNITED KINGDOM

### WHAT WILL HAPPEN TO THE RESULTS OF THE RESEARCH STUDY?

The result of this research will be submitted as a PhD thesis to the School of Law Politics and Sociology of the University of Sussex. Subject to academic information dissemination of the University of Sussex, the findings of the research will be published by the School and will be available in the school's data base subject to regulation on access of information. You can obtain a published copy of this dissertation through the University of Sussex.

### WHO IS ORGANISING AND FUNDING THE RESEARCH?

I am conducting this research as a PhD candidate in the School of Law at University of Sussex. The research is funded by NUFFIC/NFP through NICHE/RWA/008 "Strengthening the human resource capacity of the Institute of Legal Practice and Development (ILPD)", in Rwanda.

### WHO HAS APPROVED THIS STUDY?

The research has been approved through the School of Law, Politics and Sociology Ethical Review Process.

### CONTACT FOR FURTHER INFORMATION

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Thank you very much and look forward to working with you on this project.

DATE

30 September 2014